Federal Judicial Center National, Case-Based Civil Rules Survey

Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules

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Federal Judicial Center
October 2009

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Executive Summary

This report presents preliminary findings from a survey of attorneys in recently closed civil cases which the Federal Judicial Center conducted in May and June of 2009. Nearly half of the attorneys invited to participate responded. The report covers discovery activities and case management in the closed cases; electronic discovery activity in the closed cases; attorney evaluations of discovery in the closed cases; the costs of litigation and discovery; and attorney attitudes toward specific reform proposals and, more generally, the Federal Rules of Civil Procedure.

Discovery activity and case management

The parties conferred to plan discovery in more than 80 percent of cases in which respondents reported at least one type of discovery out of 12 types queried. Most commonly reported were interrogatories and requests for production of documents, followed by initial disclosures and informal exchanges of documents. The median number of types of discovery per case was 5.

The court adopted a discovery plan in more than 70 percent of respondents' cases. The most common case management activities reported by respondents were conferring to plan discovery and limiting the time for completion of discovery. The median time imposed for completion of discovery was 6 months.

Courts ruled on at least one summary judgment motion in more than a quarter of respondents' cases. Rule 12(b)(6) motions were ruled on in more than 10 percent.

Electronic discovery

Issues related to electronically stored information ("ESI") were discussed by the parties in more than 30 percent of the discovery planning conferences. The most common issues discussed were the parties' routine practices regarding retention of ESI and the format of production of ESI. Approximately 50 percent of parties eventually producing ESI instituted a litigation "freeze."

Respondents reported a request for production of ESI in 30 to 40 percent of cases with any discovery. In the ESI cases, plaintiffs tended to be requesting parties and defendants tended to be producing parties, but more than 40 percent of plaintiff attorneys and more than 50 percent of defendant attorneys reported representing both a producing and requesting party in the closed cases.

Problems relating to ESI occurred in about a quarter of the cases with a request for production of ESI. The most common problem was a dispute that could not be resolved without court action over the burden of production of ESI.

The most common uses of ESI produced in discovery in the closed cases were in preparing and deposing witnesses, in interviewing clients or clients' employees, and in evaluating cases for settlement. The ESI was reportedly not used in approximately 1 in 5 cases.

Attorney evaluation of discovery in the closed cases

More than 60 percent of respondents (and 2 out of 3 defendant attorneys) reported that the disclosure and discovery in the closed cases generated the "right amount" of information. More than half reported that the costs of discovery were the "right amount" in proportion to their client's stakes in the closed cases.

A majority of respondents reported that the parties were able to reduce the cost and burden of discovery by cooperating. A majority also reported that the costs of discovery had "no effect" on the likelihood of settlement in the closed cases.

Costs of litigation

For the closed cases included in the sample, the median cost, including attorney fees, was $15,000 for plaintiffs and $20,000 for defendants. For plaintiffs, reported costs ranged from $1,600 at the 10th percentile to $280,000 at the 95th percentile; for defendants, the range was from $5,000 at the 10th percentile to $300,000 at the 95th percentile. Median costs were higher in cases with electronic discovery (especially if the client was both a producing and requesting party) and in cases with more reported types of discovery.

The median estimate of the percentage of litigation costs incurred in discovery was 20 percent for plaintiffs and 27 percent for defendants. Electronic discovery costs accounted for 5 percent of the costs of discovery, at the median, in plaintiff attorneys' cases with discovery of ESI, and 10 percent, at the median, in defendant attorneys' cases with discovery of ESI.

The median estimate of the stakes in the litigation for plaintiffs was $160,000; estimates ranged from less than $15,000 at the 10th percentile to almost $4 million at the 95th percentile. The median estimate of the stakes for defendant attorneys was $200,000; estimates ranged from $15,000 at the 10th percentile to $5 million at the 95th percentile.

Reported expenditures for discovery, including attorney fees, amounted to, at the median, 1.6 percent of the reported stakes for plaintiff attorneys and 3.3 percent of the reported stakes for defendant attorneys.

Reform proposals

When asked at what point in litigation the central issues are narrowed and framed for resolution in the typical case, respondents most commonly identified "after fact discovery." In the closed case itself, over half of the respondents reported that the central issues were narrowed and framed for resolution after initial disclosure of non-expert documents. For plaintiff attorneys, the most common response in the closed case was at the initial complaint.

Respondents representing primarily defendants tended to favor raising pleading standards, and those representing primarily plaintiffs tended to disfavor raising pleading standards. Respondents representing plaintiffs and defendants about equally were divided on the issue.

Respondents were somewhat open to the general idea of testing simplified procedures, with all parties' consent, in a limited number of districts.

The Rules in general

Respondents were asked several questions about the operation of the Rules and potential changes to the Rules. When respondents were asked to compare the costs of litigation and discovery in the federal and state courts, the responses were mixed; a narrow plurality tended to disagree that litigation and discovery are more expensive in the federal courts than in the state courts.

When asked whether the Rules should be revised to limit electronic discovery specifically, respondents representing primarily plaintiffs tended to disagree and those representing primarily defendants tended to agree. On the other hand, those representing plaintiffs and defendants about equally were opposed to limiting discovery in general but divided about evenly on the specific question of limiting electronic discovery.

A majority of respondents in all three groups supported revising the Rules to enforce discovery obligations more effectively.

More than two-thirds of respondents agreed with the statement that "the procedures employed in the federal courts are generally fair," and a majority disagreed with the statement that "discovery is abused in almost every case in federal court."

Respondents seemed relatively satisfied with current levels of judicial case management in the federal courts.

I. Introduction[1]

In late 2008, the Honorable Mark R. Kravitz, chair of the Judicial Conference's Advisory Committee on Civil Rules ("the Committee"), requested that the Federal Judicial Center ("the Center") conduct research to support the Committee's planned May 2010 conference on civil litigation at Duke University Law School. Judge Kravitz's request indicated that the Committee's "priority is to examine the costs of discovery and to identify successes and problems related to electronic discovery under the revised rules."[2] Judge Kravitz appointed District Judge John Koeltl to chair a planning committee for the 2010 conference. In response to the Committee's request and in consultation with Judges Kravitz and Koeltl and the Committee's reporters, Professors Edward Cooper and Richard Marcus, the Center designed and administered a national, case-based survey of attorneys. The survey was designed to parallel, in several key respects, one previously conducted for the Committee.[3]

This report presents preliminary findings from the survey. A large sample of attorneys listed as counsel in federal civil cases terminated in the last quarter of 2008 were invited to participate; most of the survey questions focused on respondents' experiences in the recently terminated cases. The survey was administered in May and June of 2009. Nearly half of the attorneys invited to participate responded (approximately 47 percent).

The sampling procedures and the attorneys in the sample are described in detail in Appendices A and B of this report. The survey instrument is reproduced in Appendix C. Hundreds of attorneys offered written comments regarding federal practice and the survey; Appendix D of this report reproduces those respondents' comments, which were edited only to protect the confidentiality of respondents.

Section II reports findings on the frequency of various activities related to discovery in general, from the planning stage through the types of discovery permitted under the Federal Rules of Civil Procedure ("the Rules"). It also reports findings on the case management activities of judicial officers in respondents' cases, including the setting of time limits for the completion of discovery and ruling on discovery-related motions. Section III reports findings on electronic discovery activities in respondents' cases, including the frequency of requests for discovery of electronically stored information (ESI) in those cases. Section IV reports findings on respondents' overall evaluations of discovery in the closed cases, including any effect discovery may have had on choice of forum, settlement, and the fairness of the case outcome.

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[1] We acknowledge the valuable assistance of a number of Center staff members in various stages of preparing and conducting the survey and drafting this report: Jared Bataillon, Joe Cecil, George Cort, Carolyn Dubay, James Eaglin, Meghan Dunn, Christina Fuentes, Jill Gloekler, Donna Stienstra, and Margaret Williams. Several members of the Committee also commented on the survey instrument. Ken Withers of the Sedona Conference provided useful comments on the instrument in general and especially on the electronic discovery questions.

[2] Letter from Honorable Mark R. Kravitz to Honorable Barbara J. Rothstein, Center Director, dated December 4, 2008.

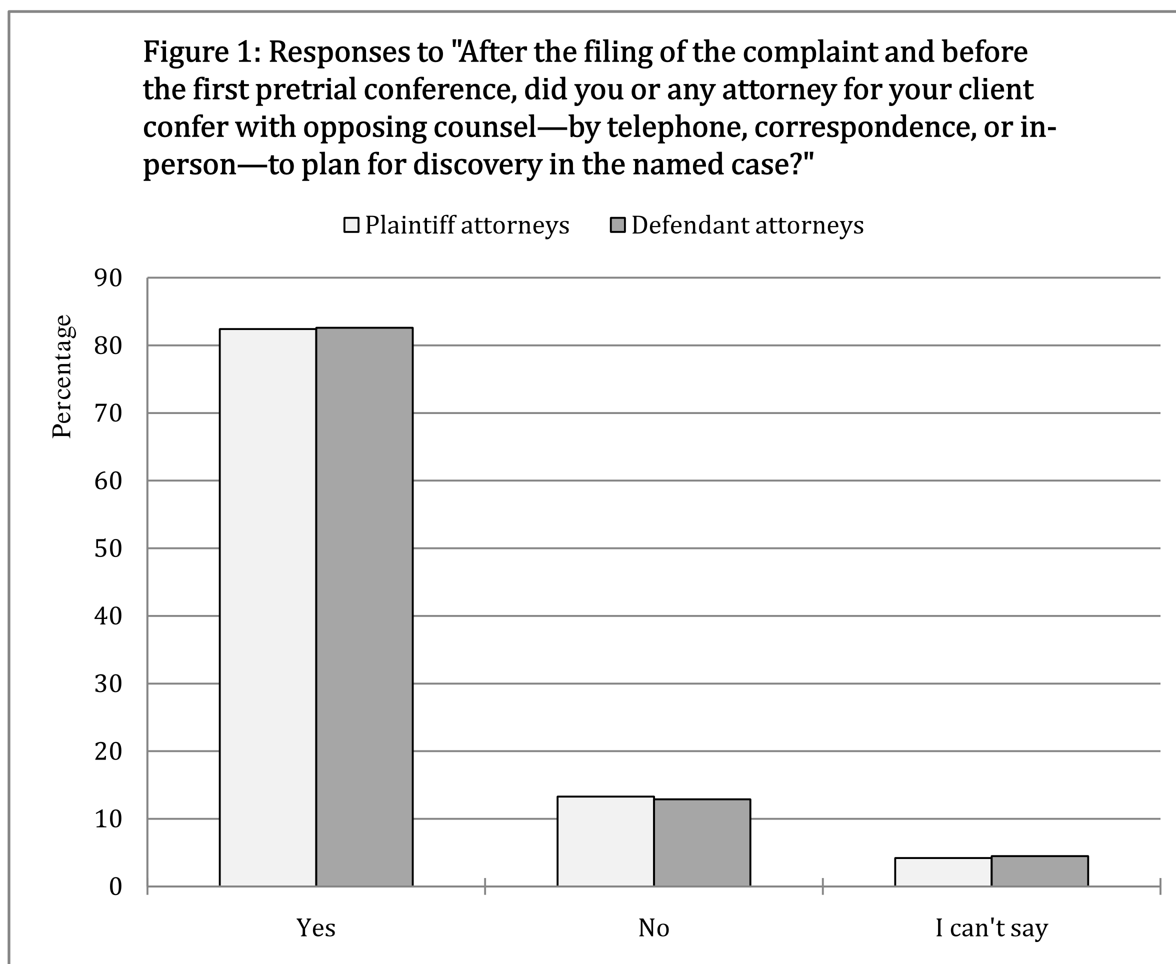
[3] Thomas E. Willging, John Shapard, Donna Stienstra, and Dean Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* (Federal Judicial Center, 1997) (hereinafter *Discovery and Disclosure*).

Section V reports findings on the costs of the closed cases as estimated by respondents. Costs are then analyzed in relation to the amount at stake in the litigation—including nonmonetary costs—and attorney opinions on the relationship between costs and the stakes of the litigation. Sections VI and VII report findings on respondents' opinions on various topics with respect to federal practice and the operation of the Rules, in general, including proposals to adopt fact pleading and/or simplified procedures in certain kinds of cases.

This report is preliminary. It does not include multivariate analysis of costs, nor does it come close to exhausting the potential of the data collected to shed light on a great range of topics. As readers will see, in many ways the report raises as many questions as it answers. It is intended, more or less, as a framework for discussion for the October meeting of the Committee and for participants in the 2010 conference. The follow-up report to the Committee in March 2010 will seek to address questions raised in the course of that discussion.

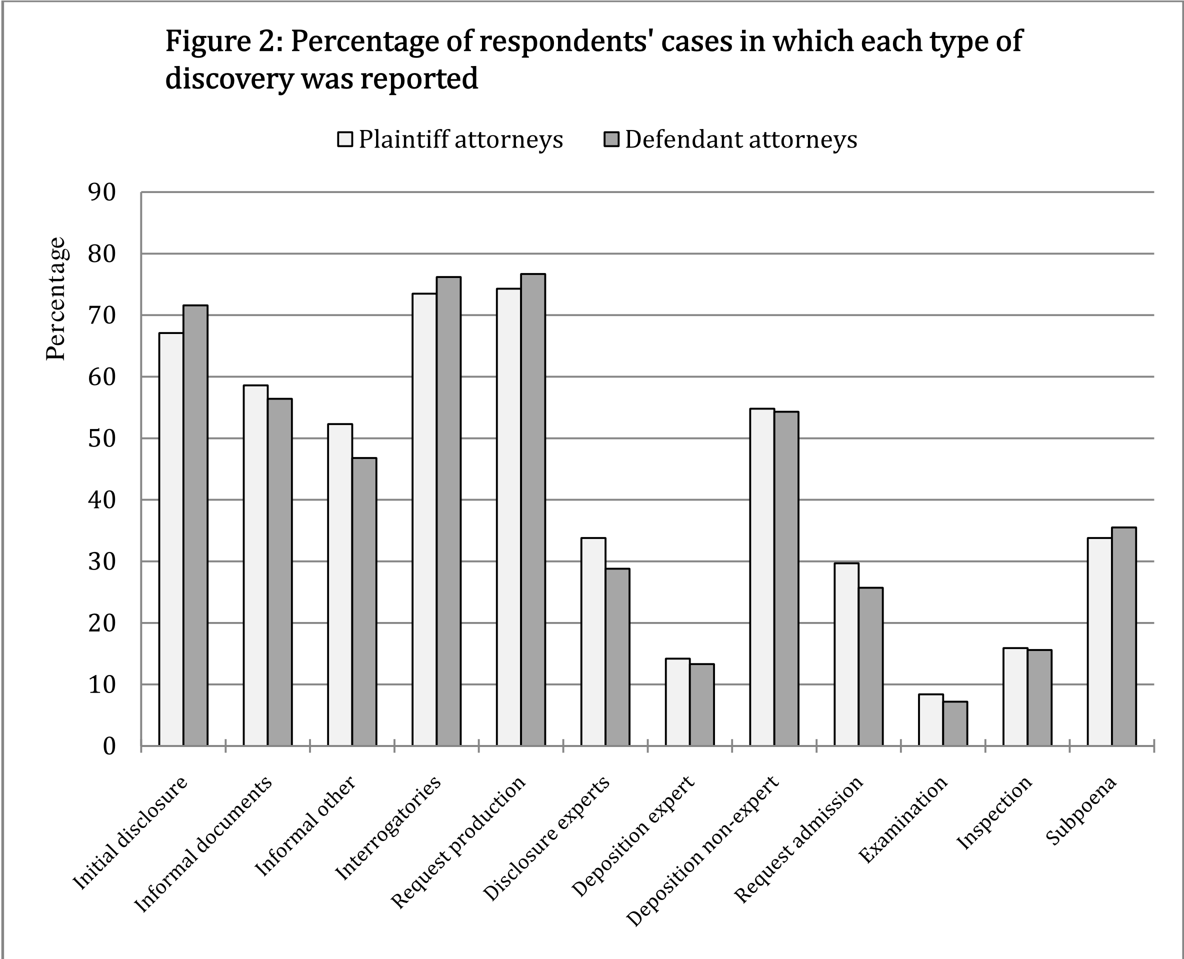
II. Discovery Activity in the Closed Cases

Question 1of the survey asked respondents whether the parties in the closed case conferred to plan for discovery. If only respondents reporting discovery events are included, as shown in Figure 1,82.4 percent of plaintiff attorneys and 82.6 percent of defendant attorneys reported a conference to plan discovery; 13.3 and 12.9 percent, respectively, reported no conference; and 4.2 and 4.5 percent, respectively, declined to answer ("I can't say").[4]



[4] Restricting the analysis to those reporting one or more types of discovery, there were 2,371 total respondents (unweighted), of which 1,183 were attorneys representing a plaintiff in the closed case ("plaintiff attorney") and 1,188 were attorneys representing a defendant in the closed case ("defendant attorney"). The designation of "plaintiff attorney" and "defendant attorney" used in this report is based on how the attorney was designated in the courts' Case Management/Electronic Case Files (CM/ECF) system. In the questions that follow, the number of respondents varies slightly, given non-responses. The weighting of cases is discussed in Appendix A, *infra*.

In question 9, the survey asked respondents whether the following types of discovery occurred in the closed case (in the order presented in the figure): initial disclosure of non-expert documents; informal exchange of documents; informal exchange of other materials; interrogatories; request for production of documents; disclosure of expert reports; deposition of experts; deposition of non-experts; requests for admission; physical or mental examination; inspection of property, computer equipment or media, or designated object; and third-party subpoena. When questions used the term "documents," they specified that it included electronically stored documents. Figure 2 displays the percentage of plaintiff and defendant attorneys responding that a particular type of discovery occurred in the closed case. Fully 86.3 percent of all respondents—89.3 percent of plaintiff attorneys and 83.6 percent of defendant attorneys—reported at least one of the types of discovery in the closed case.



Initial disclosure of non-expert documents. As shown in Figure 2, initial disclosure of non-expert documents(including electronically stored documents) was reported by more than two-thirds of respondents. Fully 67.1 percent of plaintiff attorneys and 71.6 percent of defendant attorneys reported that there was initial disclosure of non-expert documents; 27.8 and 23.3 percent, respectively, reported that there was not initial disclosure, and 5.0 and 5.1 percent, respectively, declined to answer.

Informal exchange of documents. Informal exchange of documents was reported by a majority of respondents, as shown in Figure 2. Fully 58.6 percent of plaintiff attorneys and 56.4 percent of defendant attorneys reported that there had been informal exchange of documents; 37.8 and 38.4 percent, respectively, reported no informal exchange of documents, and 3.6 and 5.2 percent, respectively, declined to answer.

Among those indicating that there was no informal exchange of documents, 27.3 percent of plaintiff attorneys and 21.8 percent of defendant attorneys reported that they discussed making an informal exchange with the other side, even though no such exchange occurred. However, most attorneys in cases without an informal exchange did not discuss making one—67.2 and 73.2 percent, respectively; 5.5 and 4.9 percent, respectively, declined to answer.

Informal exchange of other materials. A majority of plaintiff attorney respondents and slightly less than a majority of defendant attorney respondents reported informal exchange of other materials—52.3 and 46.8 percent, respectively. Fully 43.2 and 46.9 percent of respondents, respectively, reported no informal exchange of other materials, and 4.6 and 6.4 percent, respectively, declined to answer.

Interrogatories. As shown in Figure 2, about three-quarters of respondents reported interrogatories in the closed case, 73.5 percent of plaintiff attorneys and 76.2 percent of defendant attorneys; 24.8 and 21.8 percent, respectively, reported no interrogatories and 1.8 and 2.1 percent, respectively, declined to answer.

Request for production of documents. About three-quarters of respondents reported a request for production of documents, including electronically stored documents, 74.3 percent of plaintiff attorneys and 76.7 percent of defendant attorneys; 22.9 and 21.1 percent, respectively, reported no such requests, and 2.8 and 2.2 percent, respectively, declined to answer.

Disclosure of expert reports. Slightly less than one-third of all respondents reported disclosure of expert reports, 33.8 percent of plaintiff attorneys and 28.8 percent of defendant attorneys; 64.7 and 68.9 percent, respectively, reported no disclosure of expert reports, and 1.5 and 2.3 percent, respectively, declined to answer.

Respondents were also asked how many experts both sides in the closed case identified. The following figures are limited to respondents reporting disclosure of at least one expert witness by one party. As reported by plaintiff attorneys ($n = 444$), the mean number of experts disclosed by plaintiffs was 2.2, and the median was 2; the mean number identified by the defendants, as reported by plaintiff attorneys, was 1.7, and the median was 1. As reported by defendant attorneys ($n = 406$), the mean number reported by defendants was 2.0, and the median was 1; defendant attorneys reported a mean of 2.2 experts disclosed by plaintiffs, and the median was 2.

Deposition of experts. Fewer than 1 respondent in 7 reported any deposition of an expert in the closed case, 14.2 percent of plaintiff attorneys and 13.3 percent of defendant

attorneys; 84.8 and 85.5 percent, respectively, reported no expert depositions, and 0.9 and 1.2 percent, respectively, declined to answer.

Respondents were also asked how many experts each side deposed and how many of these depositions lasted more than 7 hours. The following figures are limited to respondents reporting at least one expert deposition by at least one side. The mean number of expert depositions by plaintiffs reported by plaintiff attorneys ($n = 238$) was 1.4 (median = 1); plaintiff attorneys reported a mean of 1.7 expert depositions by defendants (median = 1). The median number of depositions per case lasting more than 7 hours reported by plaintiff attorneys was 0 (zero), and the mean was 0.2.The mean number of expert depositions taken by defendants reported by defendant attorneys ($n = 235$) was 2.1 (median= 1). The mean number of expert depositions taken by plaintiffs reported by defendants was 1.2, and the median was 1. The median number of expert depositions lasting more than 7 hours per case was 0 (zero), and the mean was 0.3.

Deposition of non-experts. A majority of plaintiff attorneys (54.8 percent) and defendant attorneys (54.3 percent) reported one or more depositions of non-experts in the closed case; 44.6 and 44.7 percent, respectively, reported no non-expert depositions, and 0.6 and 1.0 percent, respectively, declined to answer.

Respondents were also asked how many non-experts each side deposed and how many of these depositions lasted more than 7 hours. The following figures are limited to respondents reporting at least one non-expert deposition by at least one side. The mean number of non-expert depositions taken by plaintiffs reported by plaintiff attorneys ($n = 724$) was 3.8, and the median was 3; the mean number of non-expert depositions taken by defendants reported by plaintiff attorneys was 2.8, and the median was 2. The median number of non-expert depositions per case reported by plaintiff attorneys as lasting more than 7 hours was 0 (zero), and the mean number was 0.8. The mean number of non-expert depositions taken by defendants reported by defendant attorneys ($n = 730$) was 2.6, and the median was 2.The mean number of non-expert depositions taken by plaintiffs reported by defendant attorneys was 3.1, and the median was 2. The median number of non-expert depositions per case reported by defendant attorneys as lasting more than 7 hours was 0 (zero), and the mean number was 0.3.

Requests for admission. More than one-quarter of respondents reported requests for admissions in the closed case, 29.7 percent of plaintiff attorneys and 25.7 percent of defendant attorneys; 64.9 and 67.4 percent, respectively, reported no requests for admission, and 5.4 and 6.9 percent, respectively, declined to answer.

Respondents were also asked how many such requests each side propounded to the other. The following figures are limited to cases with at least one request propounded by at least one side. Plaintiff attorneys ($n = 344$) reported a mean number of requests for admission propounded by plaintiffs of 22 per case, and a median of 15, and a mean number of requests propounded by defendants of 20.8, and a median of 0 (zero). Defendant attorneys ($n = 296$) reported a mean number of requests propounded by defendants of 13.2 per case, and a median of 9, and a mean number of requests propounded by plaintiffs of 21.9 per case, and a median of 4.

Physical or mental examination. Fewer than 1 in 10 respondents reported a physical or mental examination in the closed case, 8.4 percent of plaintiff attorneys and 7.2 percent of defendant attorneys; 90.6 and 91.7 percent, respectively, reported no such examination, and 1.0 and 1.1 percent, respectively, declined to answer.

Inspection of property, computer equipment or media, or designated objects. Fully 15.9 percent of plaintiff attorneys and 15.6 percent of defendant attorneys reported an inspection of property, including computer equipment, in the closed case; 82.9 and 83.4 percent, respectively, reported no inspection, and 1.1 and 1.0 percent, respectively, declined to answer.

Third-party subpoena. More than 1 in 3 respondents reported a third-party subpoena in the closed case, 33.8 percent of plaintiff attorneys and 35.5 percent of defendant attorneys; 62.9 and 59.7 percent, respectively, reported no subpoena, and 3.3 and 4.8 percent, respectively, declined to answer.

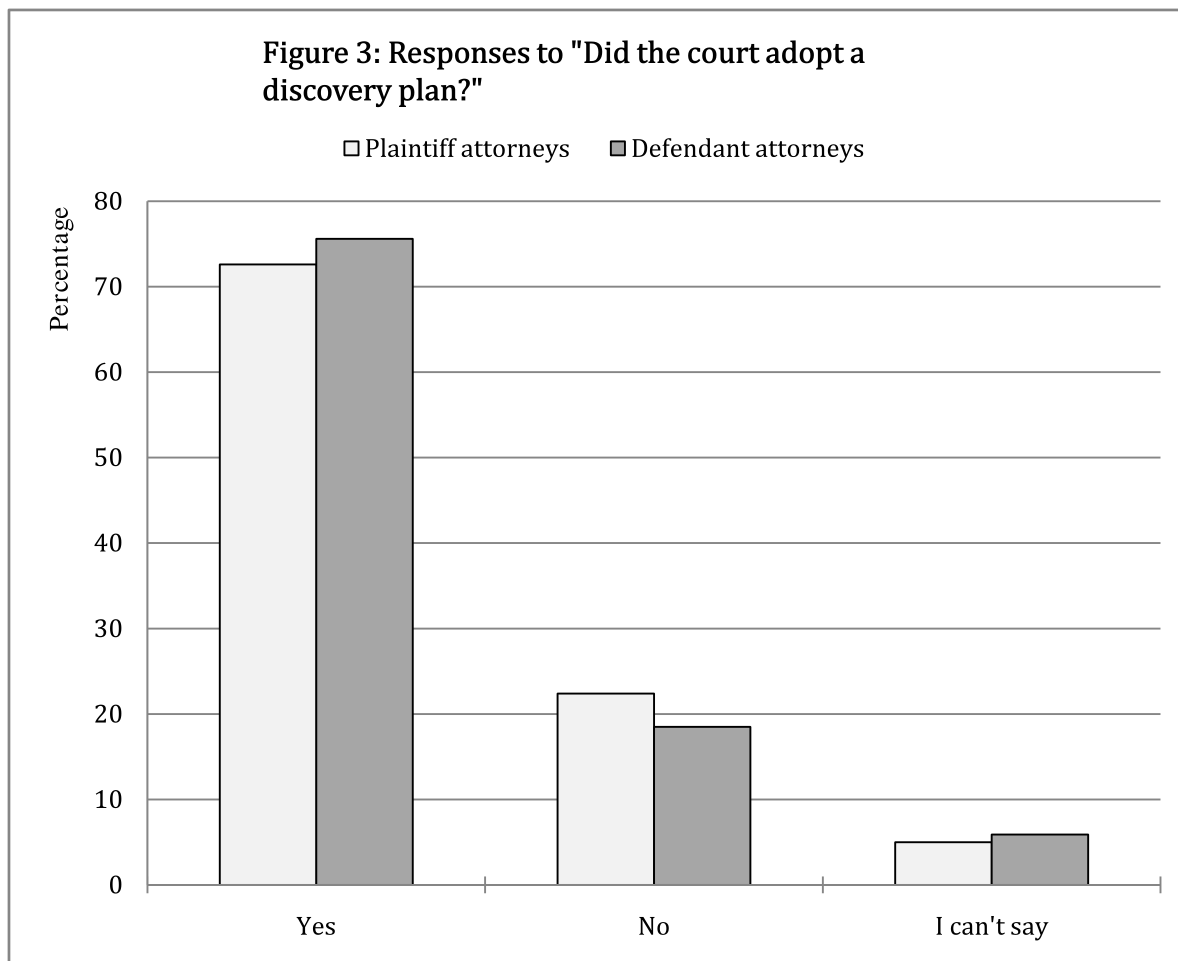
Respondents were also asked how many third-party subpoenas were issued by each side. The following figures are limited to respondents reporting at least one third-party subpoena by one side in the closed case. Plaintiff attorneys ($n = 437$) reported a mean number of subpoenas issued by plaintiffs of 3.3 per case, and a median of 1; plaintiff attorneys reported a mean number of subpoenas issued by defendants of 3.9 per case, and a median of 1. Defendant attorneys ($n = 468$)reported a mean number of subpoenas issued by defendants of 3.8 per case, and a median of 3; defendant attorneys reported a mean number of subpoenas issued by plaintiffs of 1.1, and a median of 0 (zero).

In order to measure (in a fairly rough fashion) the volume of discovery in each closed case, we calculated a simple additive index. For example, a case in which the respondent reported only an informal exchange of documents would receive a score of 1, a case with an informal exchange of documents and an informal exchange of other materials would receive a score of 2, and so on. The maximum score is 12, for the few cases in which every type of discovery asked about in the survey(and as displayed in Figure 2) was reported to have occurred. In cases with at least one reported discovery type, the mean number of discovery types for plaintiff attorneys ($n = 1{,}184$) and defendant attorneys ($n = 1{,}193$) was 5.1 per closed case, and the median for both groups was 5 types of discovery per case.

Respondents were asked in question 50 to estimate, in general, what percentage of their practice is spent in discovery-related activities. Not surprisingly, respondents representing primarily defendants, in general, reported that a greater percentage of their time was consumed by discovery-related activities than did those representing primarily plaintiffs or those reporting that they represent plaintiffs and defendants about equally. Respondents representing primarily plaintiffs gave a median response of 40 percent of their practice spent in discovery-related activities, and a mean of 42.7 percent. The 10th percentile response was 10 percent, and the 95th percentile was 85 percent ($n = 759$). Respondents representing plaintiffs and defendants about equally in their practice reported a median of 30 percent, and a mean of 36.4 percent. The 10th percentile was 10 percent, and the 95th percentile was 75 percent ($n = 548$). Respondents representing primarily defendants reported a median of 50 percent of their practice time spent in discovery-related activities, and a mean of 47.7 percent. The 10th percentile for this group was 20 percent, and the 95th percentile was 85 percent ($n = 1{,}002$).

Question 6 asked respondents whether the court adopted a discovery plan in the closed case. As shown in Figure 3, about three-quarters of respondents in closed cases with at least one type of discovery reported that the court had adopted a discovery plan. Fully 72.6 percent of plaintiff attorneys and 75.6 percent of defendant attorneys reporting some discovery activity in the case indicated that the court adopted a plan;22.4 and 18.5 percent,

respectively, reported that the court did not adopt a plan; and 5.0 and 5.9 percent, respectively, declined to answer.



Respondents were asked, in question 20, whether a judicial officer (including a special master or other neutral) performed various actions that have been grouped under the heading "case management." As shown in Figure 4, one of the most common responses, reported by 45.2 percent of plaintiff attorneys and 44.6 percent of defendant attorneys, was to limit the time for completion of discovery.[5] Plaintiff attorneys ($n = 466$) and defendant attorneys ($n = 483$) reported the same median (6 months) and mean (7.3 months) time limitations.

[5] In cases with one or more reported discovery events (weighted); $n = 2{,}379$, with 1,193 plaintiff attorneys and 1,184 defendant attorneys responding.

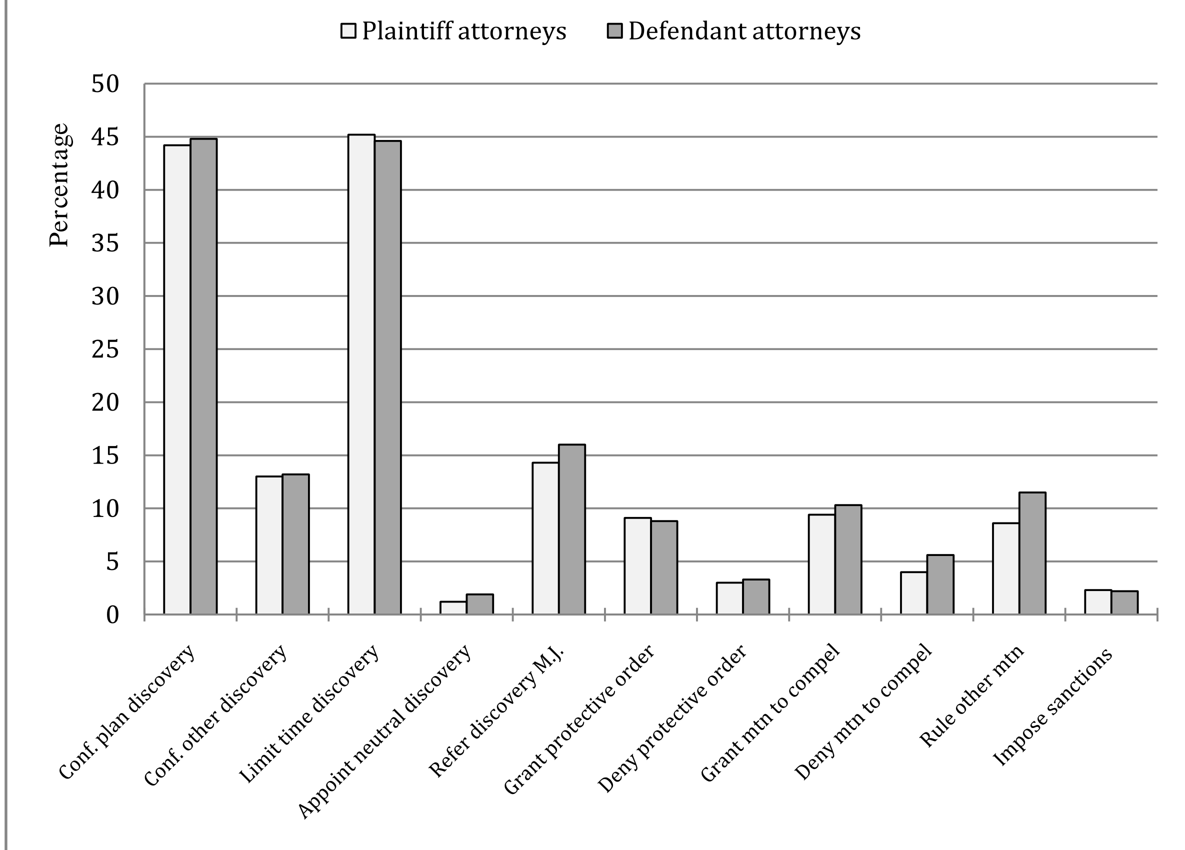


Figure 4: Judicial case management of discovery reported in the closed cases

The other most common response was the judicial officer held a conference (by telephone, correspondence, or in-person) to consider a plan for discovery. Fully 44.2 percent of defendant attorneys and 44.8 percent of plaintiff attorneys reported that a judicial officer held such a conference. No other action was reported by more than 20 percent of respondents. The district judge in the closed case referred a discovery issue to a magistrate judge in 14.3 percent of plaintiff attorneys' cases and in 16.0 percent of defendant attorneys' cases. Few cases saw the appointment of a neutral to oversee discovery matters; this was reported by 1.2 percent of plaintiff attorneys and 1.9 percent of defendant attorneys.

The court granted motions to compel discovery in 9.4 percent of plaintiff attorneys' cases and in 10.3 percent of defendant attorneys' cases, and denied motions to compel in 4.0 and 5.6 percent, respectively. The court granted a protective order in 9.1 percent of plaintiff attorneys' cases and in 8.8 percent of defendant attorneys' cases, and denied a motion for a protective order in 3.0 and 3.3 percent, respectively. The court also ruled on another discovery-related motion in 8.6 and 11.5 percent of cases, respectively. A discovery conference, other than to plan for discovery, was held in 13 and 13.2 percent of cases, respectively.

Sanctions related to discovery were reported in 2.3 percent of the plaintiff attorneys' cases and 2.2 percent of the defendant attorneys' cases.

Respondents were also asked whether the court ruled on various types of motions. The responses are summarized in Table 1. Rulings on Rule 56 summary judgment motions were reported by more than a quarter of respondents—by 25.1 percent of plaintiff attorneys and 27.7 percent of defendant attorneys.[6] Rulings on Rule 12(b)(6) motions to dismiss for failure to state a claim were reported by 11.0 and 13.2 percent, respectively. Rulings on other Rule 12(b) motions to dismiss were reported by 7.5 and 7.8 percent, respectively. Rulings on Rule 12(c) and 12(e) motions were relatively uncommon.

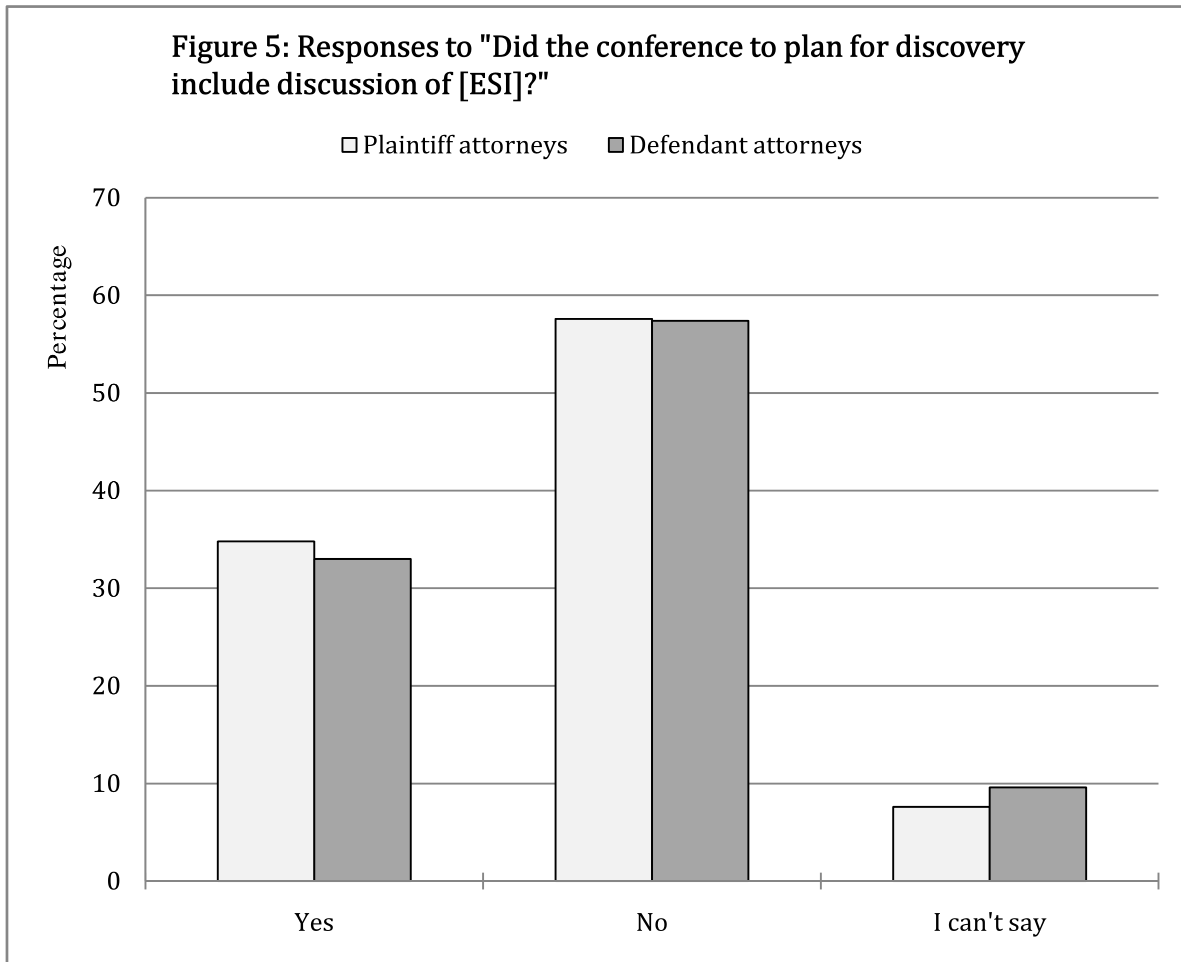
Table 1: Rulings on motions, cases with at least one reported type of discovery

Type of Motion	Plaintiff attorneys (%)	Defendant attorneys (%)
Rule 12(b)(6)	11.0	13.2
Other Rule 12(b)	7.5	7.8
Rule 12(c)	1.6	1.7
Rule 12(e)	1.2	1.1
Rule 56	25.1	27.7
Can't say	7.7	7.3
N	1,176	1,193

[6] Rulings on summary judgment motions were much more common in the cases terminated by trial (67.1 percent of all respondents in such cases) and in the long-pending cases (62.5 percent) than in cases selected at random (23.8 percent). See Appendix A for more information on these cases.

III. Electronic Discovery Activity in the Closed Cases

Respondents were asked, in question 2, whether the conference to plan discovery included discussion of ESI. About 1 in 3 respondents reported that the conference included discussion of ESI, 34.8 percent of plaintiff attorneys and 33.0 percent of defendant attorneys.[7] More than half of all respondents reported that the conference to plan for discovery did not include discussion of ESI—57.6 percent of plaintiff attorneys and 57.4 percent of defendant attorneys; 7.6 and 9.6 percent, respectively, declined to answer. The distribution of responses is displayed in Figure 5.



[7] In cases in which a conference to plan discovery was reported, there were 1,926 total respondents, composed of 959 attorneys representing plaintiffs in the closed case and 967 attorneys representing defendants in the closed case.

Only about 1 respondent in 5 reported that the discovery plan adopted by the court included provisions related to ESI—20.1 percent of plaintiff attorneys and 22.5 percent of defendant attorneys (question 7).

In closed cases in which the conference to plan for discovery included discussion of ESI, respondents were asked to identify which of a series of potential issues were discussed (questions 3 and 4). Question 3 focused on issues related to the collection of ESI. The distribution of responses to question 3 is summarized in Table 2.

Table 2: Reported issues related to collection of ESI, in cases where ESI issues were discussed at discovery conference

Issue	Plaintiff attorneys (%)	Defendant attorneys (%)
Parties' practices re: retention of ESI	46.5	55.5
Scope, method, duration of preserving ESI	36.1	37.5
Potential cost or burden of collecting, reviewing, and producing ESI	34.4	36.0
Restricting scope or altogether avoiding discovery of ESI	32.8	41.9
Whether ESI stored or in format "not reasonably accessible"	22.0	15.6
Methods of searching by topic	17.1	18.7
Methods of searching by custodian	19.3	18.5
Possibility of phased discovery of ESI	12.0	10.3
Possibility of sampling	3.8	6.0
Culling techniques	8.5	11.2
Dynamic database issues	2.5	4.2
Voicemail, etc.	6.8	6.3
N	316	312

For both plaintiff and defendant attorneys, the most common reported issue related to collection was the parties' practices with respect to retention of ESI, reported by 46.5 percent of plaintiff attorneys and 55.5 percent of defendant attorneys. For plaintiff attorneys, the next most common topics were the scope, cost, method, or duration of preserving ESI (36.1 percent); the potential cost or burden of collecting, reviewing, and producing ESI (34.4 percent); restricting the scope or avoiding altogether the discovery of ESI (32.8 percent); and whether potentially responsive information was stored on a device or in a format that a party considered "not reasonably accessible" (22.0 percent). For defendant attorneys, the next most common responses were restricting the scope or avoiding altogether the discovery of ESI (41.9 percent); the scope, cost, method, or duration of preserving ESI (37.5 percent); and the potential cost or burden of collecting, reviewing, and producing ESI (36 percent).

No other issue related to collection of ESI was reported to have been discussed by more than 20 percent of either plaintiff or defendant attorneys in closed cases in which the discovery conference included discussion of ESI. Defendant attorneys reported discussing whether potentially responsive information was stored on a device or in a format that a party considered "not reasonably accessible" 15.6 percent of the time. Parties reported discussing methods of searching for or reducing the scope of responsive documents by topic, including search terms—by 17.1 percent of plaintiff attorneys and 18.7 percent of defendant attorneys—and methods of searching for or reducing the scope of responsive documents by custodian, in 19.3 and 18.5 percent, respectively. Discussion of the possibility of phased discovery of ESI was reported by 12 and 10.3 percent, respectively; discussion of the possibility of sampling to determine whether production was justified, by 3.8 and 6 percent, respectively; and discussion of the use of culling techniques such as date ranges or file extensions, by 8.5 and 11.2 percent, respectively. Issues related to information contained in dynamic databases was reported discussed by 2.5 percent of plaintiff attorneys and 4.2 percent of defendant attorneys, and issues related to Instant Messaging, Voicemail, and the like, by 6.8 and 6.3 percent, respectively.

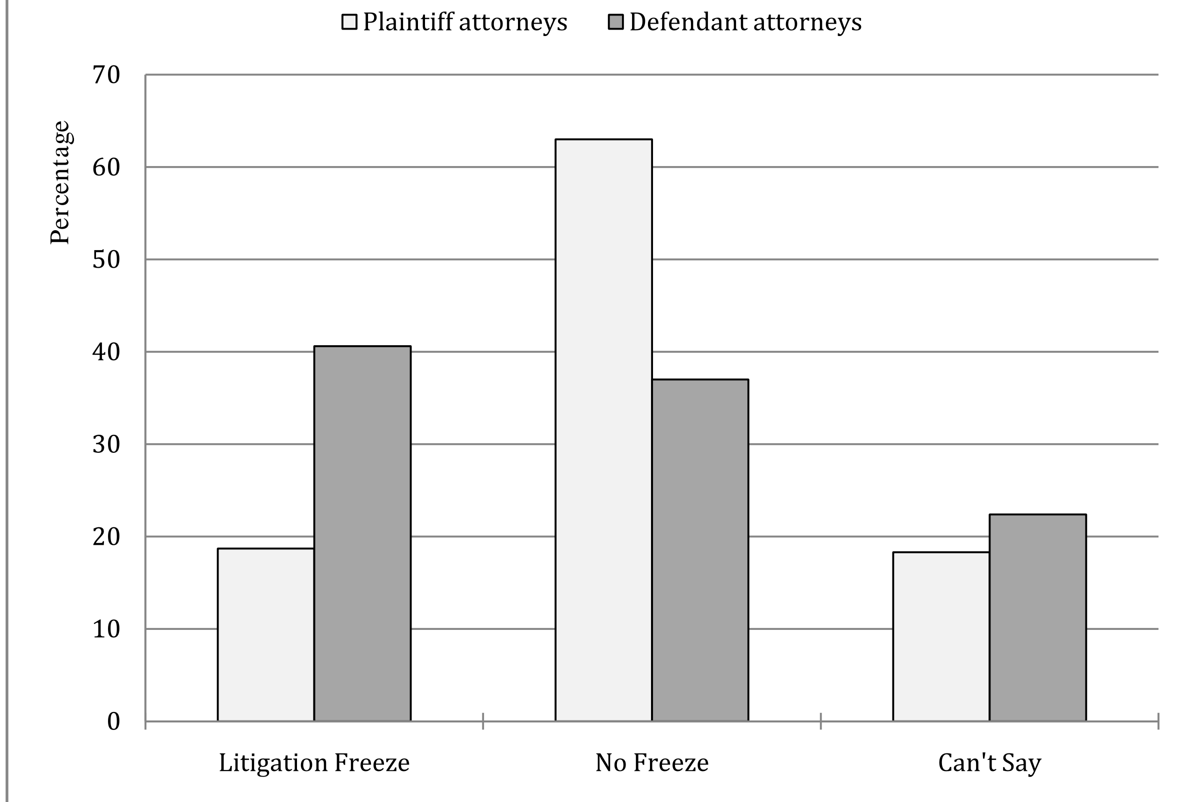
Question 4 focused on issues related to the production of ESI. The distribution of responses is summarized in Table 3. The most common response for both plaintiff attorneys (51.1 percent of those reporting that the discovery conference included discussion of ESI) and defendant attorneys (46.1 percent) was the format of production of ESI (e.g., pdf, tiff, native format). The next most common responses for both groups were methods of handling confidential or trade secret information, confidential communications, or information subject to work-product privilege, reported by 38.3 percent of plaintiff attorneys and 36.5 percent of defendant attorneys, and the media of production of ESI (e.g., paper printouts, compact disks, hard drives), reported by 31.9 and 36.7 percent, respectively. Fully 29.1 percent of plaintiff attorneys and 26.4 percent of defendant attorneys reported discussing privilege log issues, and 27.7 and 26.2 percent, respectively, reported discussing the media on which the parties routinely maintain their ESI.

Table 3: Reported issues related to production of ESI, in cases where ESI issues were discussed at discovery conference

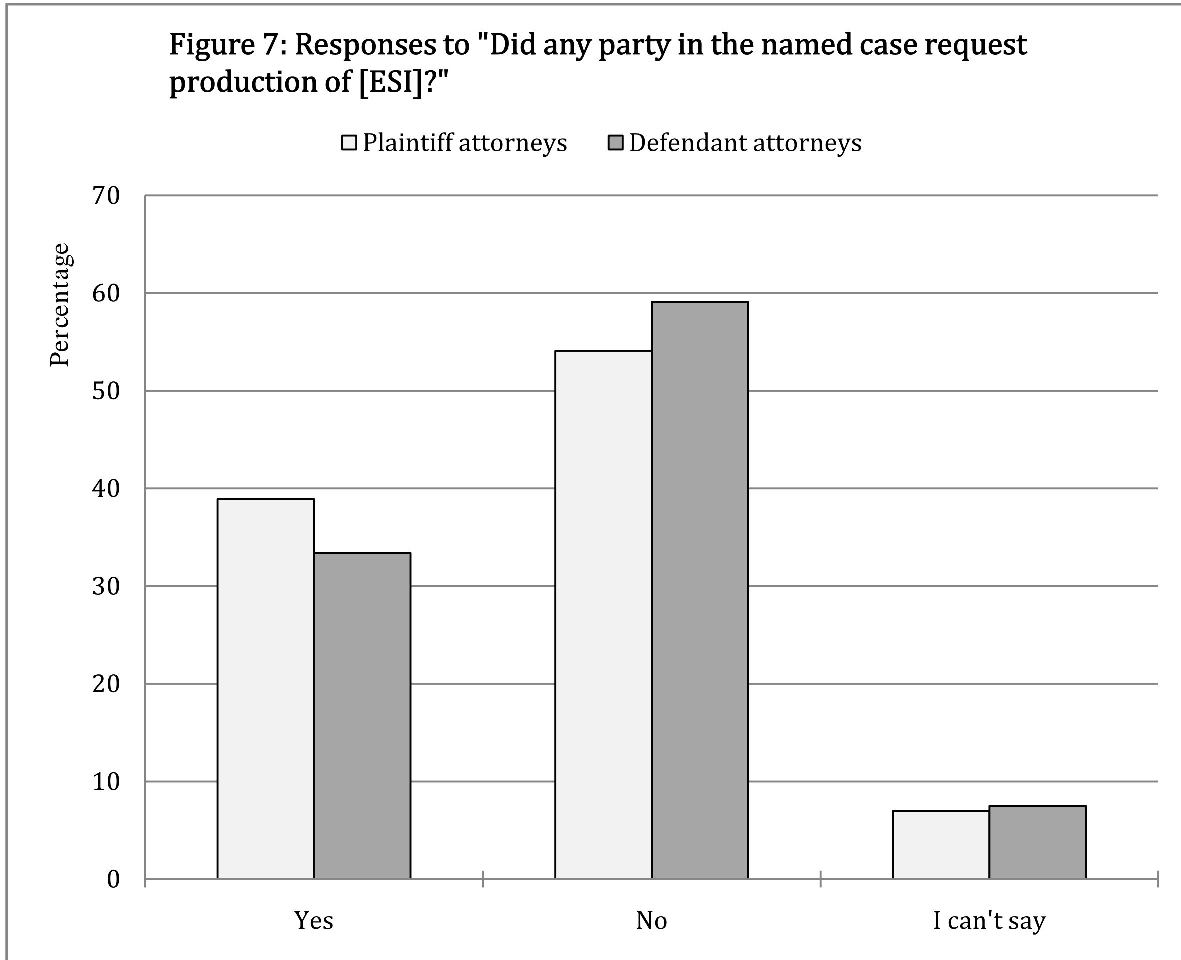
Issue	Plaintiff attorneys (%)	Defendant attorneys (%)
Format of production of ESI (pdf, tiff, native format)	51.1	46.1
Confidential, trade secret, privileged communications	38.3	36.5
Media of production of ESI	31.9	36.7
Privilege log issues	29.1	26.4
Media/how parties routinely maintain ESI	27.7	26.2
Indexing/organizing responsive documents	14.1	12.8
"Claw back" agreements	13.6	17.4
Production of metadata	11.2	13.6
Load files	10.9	8.7
"Quick peek" agreements	3.6	2.1
N	316	312

Other issues related to production of ESI were reported less often: document indexing or other methods of organizing responsive electronic documents (14.1 percent of plaintiff attorneys and 12.8 percent of defendant attorneys); so-called "claw back" agreements (13.6 and 17.4 percent, respectively); the production of metadata (11.2 and 13.6 percent, respectively); the need for, or content of, accompanying load files (10.9 and 8.7 percent, respectively); and so-called "quick peek" agreements (3.6 and 2.1 percent, respectively).

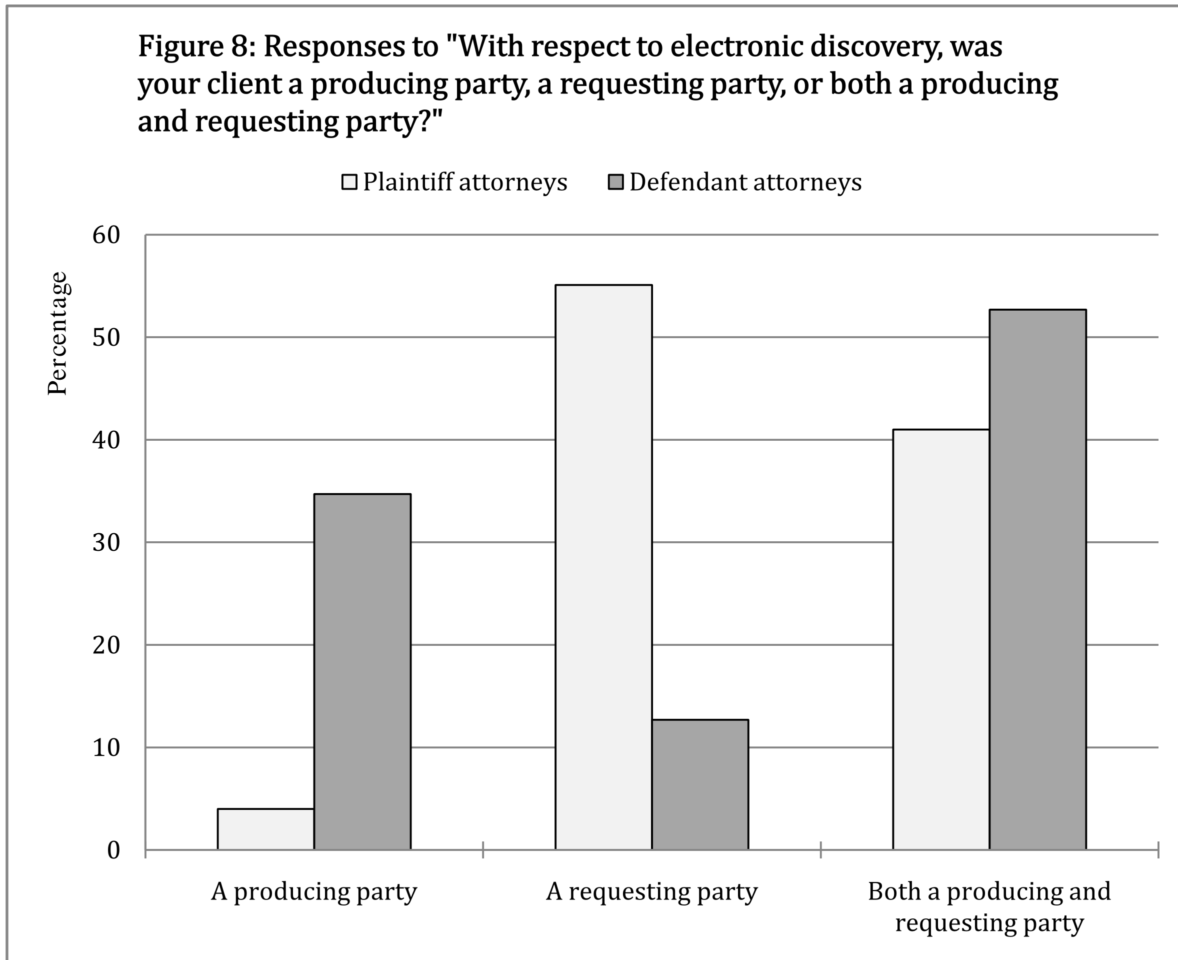
Respondents were asked, in question 5, whether their client in the closed case had placed a litigation hold or "freeze" on deletion of ESI in anticipation of or in response to the filing of the complaint. The distribution of responses, in cases with one or more reported discovery events, is displayed in Figure 6. Fully 18.7 percent of plaintiff attorneys and 40.6 percent of defendant attorneys reported that their client in the closed case had initiated such a hold; 63 and 37 percent, respectively, reported no such hold; and 18.3 and 22.4 percent, respectively, declined to answer. The much higher percentage of defendant attorneys reporting litigation holds makes sense in light of the expectation—supported below—that defendants are more likely to be producing parties than are plaintiffs.



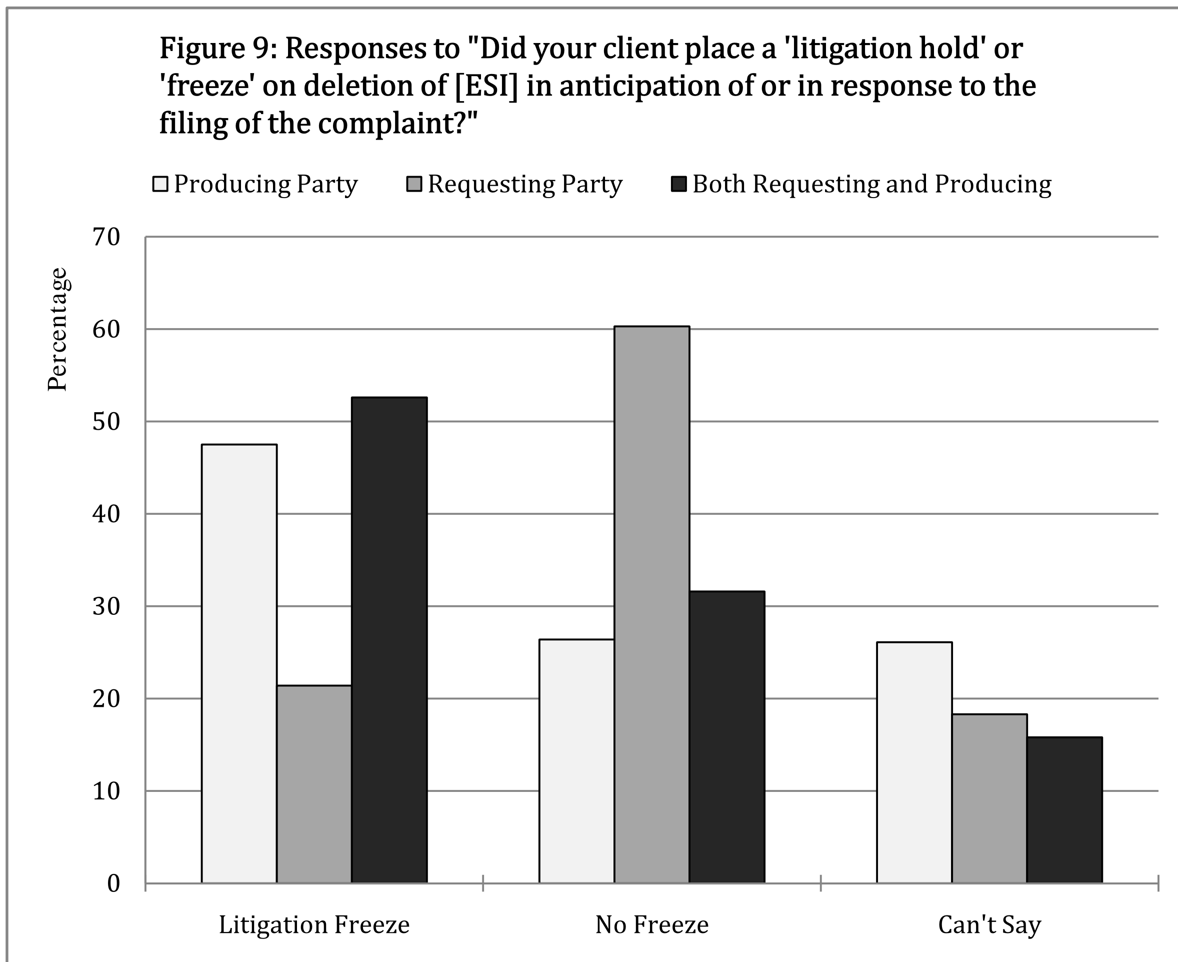
As displayed in Figure 7, requests for production of ESI were reported by 36.1 percent of respondents—38.9 percent of plaintiff attorneys and 33.4 percent of defendant attorneys. Again, a majority of respondents—54.1 percent of plaintiff attorneys and 59.1 percent of defendant attorneys—reported that no party requested production of ESI in discovery in the closed case. In more than a quarter of cases with a request for production of ESI, respondents reported no discussion of ESI at the conference to plan for discovery (25.5 and 29.8 percent, respectively).



Respondents reporting a request for production of ESI in the closed case were asked whether their clients were producing parties, requesting parties, or both producing and requesting parties (question 11). The distribution of responses is displayed in Figure 8. As one would expect, plaintiff attorneys were more likely to be requesting parties (55.1 percent) than producing parties (4.0 percent), although a sizeable proportion of plaintiff attorneys reported that, in the closed case, their client was both a producing and requesting party (41.0 percent). In other words, plaintiff attorneys reported requesting status in 96 percent of cases in which they reported a request for ESI. Defendant attorneys were less likely to be requesting parties (12.7 percent) than producing parties (34.7 percent), but in cases with electronic discovery they most often reported being both a producing and requesting party (52.7 percent). Somewhat surprisingly, defendant attorneys reported requesting status in 65.4 percent of cases in which they reported a request for ESI. The majority of ESI cases in the sample, then, involved requests for production of ESI from both sides of the litigation.



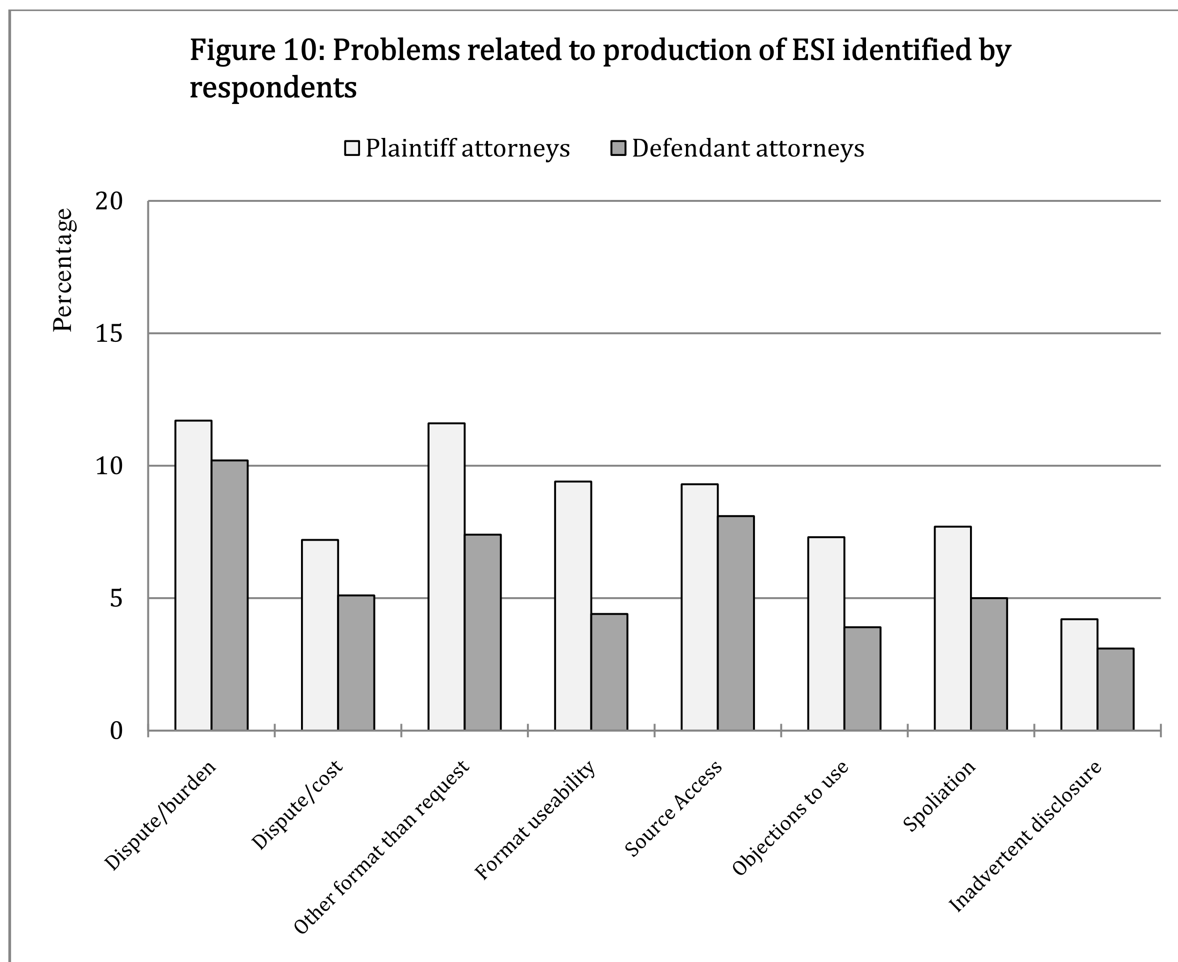
Producing parties, including parties that requested and produced ESI, were more likely to have initiated a litigation freeze. The distribution of these responses is displayed in Figure 9. Parties that both produced and requested ESI reported litigation freezes in 52.6 percent of cases, and parties that produced only reported initiated freezes in 47.5 percent of cases. Requesting only parties, by contrast, initiated litigation freezes in just 21.4 percent of cases and reported no such freeze in 60.3 percent of cases. Again, relatively high levels of respondents declined to answer the question—26.1 percent of producing parties, 18.3 percent of requesting parties, and 15.8 percent of parties both producing and requesting ESI. In short, the actual incidence of litigation freezes may be higher than shown in the figure.



Respondents were asked to estimate the percentage of the ESI collected on behalf of their clients that was reviewed for responsiveness and privilege prior to production. The median response for both plaintiff and defendant attorneys was 100 percent, although the mean responses for plaintiff and defendant attorneys were63.3 and 64.9 percent, respectively. Respondents were then asked to estimate the percentage of ESI collected on their clients' behalf that was produced as responsive and non-privileged. The median response for plaintiff attorneys was 65.0 percent, and the mean was 53.7 percent. The median response for defendant attorneys was 50.0 percent, and the mean was 51.5 percent.

Respondents were asked to identify resources used in collecting and producing ESI. The following figures represent the responses of producing parties only. The most common response for both plaintiff and defendant attorneys was information technology (IT) staff internal to the client—30.7 percent for plaintiff attorneys and 54.3 percent of defendant attorneys—followed by IT staff internal to the law firm—30.2 and 32.2 percent, respectively. Relatively few respondents, 15.3 and 14.5 percent, respectively, reported using an IT vendor (not internal to the law firm or the client). Similarly, relatively few respondents reported using contract attorneys to conduct responsiveness review—5.6 and 6.7 percent, respectively—or privilege review—5.0 and 6.4 percent, respectively. About 1 in 7 respondents declined to answer this question.

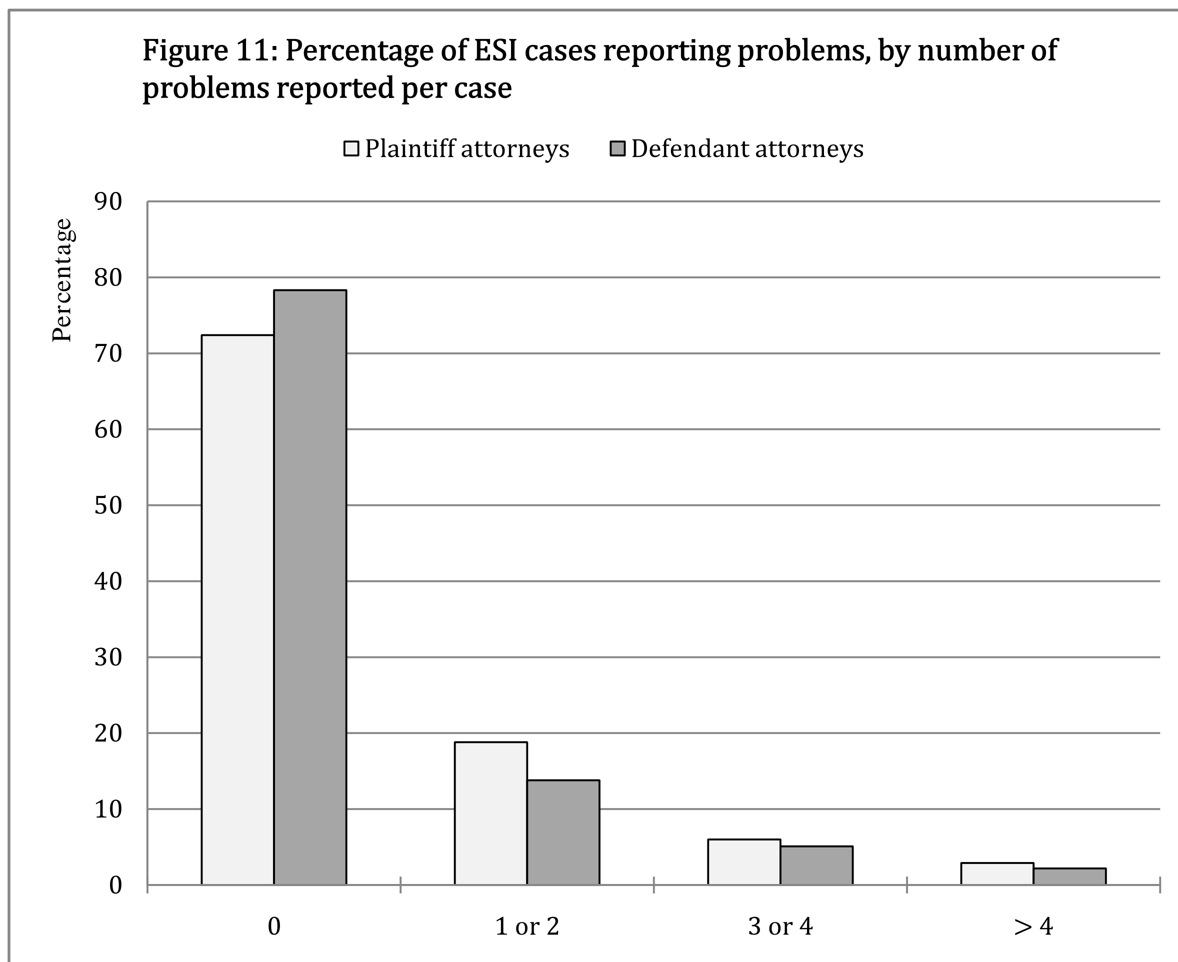
Respondents were asked whether, prior to the filing of the closed case, the client had implemented an enterprise content management system or other information system designed to facilitate the identification and production of ESI in litigation. (This question was only asked of producing parties.) Only 6.4 percent of plaintiff attorneys and 22.4 percent of defendant attorneys reported that their client had implemented such a system. Fully 74.5 percent of plaintiff attorneys and 39.5 percent of defendant attorneys reported that the client had not implemented such a system; 19.1 and 38.1 percent, respectively, declined to answer.



Respondents were asked, in question 18, about a number of possible problems or disputes that could arise over electronic discovery. The distribution of responses is displayed in Figure 10. The percentages shown are the percentages of respondents in electronic discovery cases. Plaintiff attorneys were more likely to report problems than defendant attorneys, which is probably related to their greater likelihood of being a requesting party.

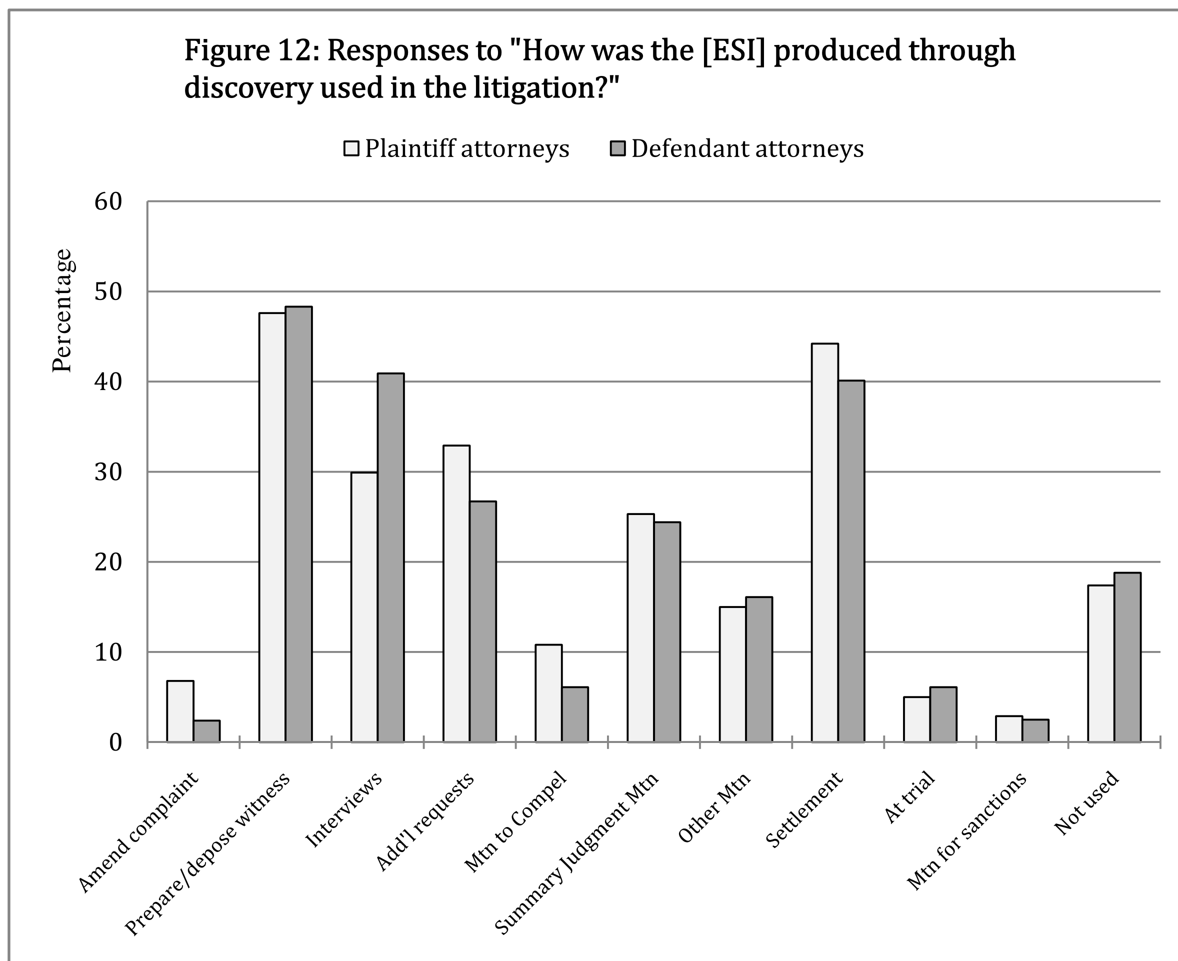
The most commonly reported problem was a dispute over the burden of production of ESI that could not be resolved without court action, which plaintiff attorneys reported in 11.7 percent of ESI cases; defendant attorneys reported this dispute in 10.2 percent of ESI

cases. The next most common problem was the production of ESI in a format other than that requested, which was reported by 11.6 percent of plaintiff attorneys and 7.4 percent of defendant attorneys. This was followed by the production of ESI that the requesting party asserted was not reasonably useable, reported by 9.4 percent of plaintiff attorneys but only 4.4 percent of defendant attorneys; requests to obtain ESI from a source the producing party contended was not reasonably accessible, reported by 9.3 and 8.1 percent, respectively; and claims of spoliation, reported by 7.7 and 5 percent, respectively. Other problems (disputes over cost, objections to use of ESI on grounds that it was not properly disclosed) were less common.



As the percentages shown in the previous figure suggest, ESI disputes were not very common in the sampled electronic discovery cases. The number of disputes over ESI per electronic discovery case is shown in Figure 11. The overwhelming majority of both plaintiff and defendant attorneys, 72.4 and 78.3 percent, respectively, reported that none of the disputes related to ESI included in question 18 had occurred in the closed case. In 18.8 and 14.3 percent, respectively, 1-2 disputes were reported; in 6.0 and 5.1 percent, respectively, 3-4 disputes were reported; and in 2.9 and 2.2 percent, respectively, more than 4 disputes were reported.

Finally, with respect to electronic discovery, specifically, respondents were asked how the ESI produced was used in the closed case. The distribution of responses is displayed in Figure 12.



Fully 17.4 percent of plaintiff attorneys and 18.8 percent of defendant attorneys responded that the ESI produced in discovery was not used at all in the closed case. The most common use of ESI was in preparing or deposing a witness—reported by 47.6 percent of plaintiff attorneys and 48.3 percent of defendant attorneys—followed by facilitating a settlement—44.2 and 40.1 percent, respectively—and in interviews with clients or clients' employees, 29.9 and 40.9 percent, respectively. Other relatively common responses included use in an additional discovery request—reported by 32.9 percent of plaintiff attorneys and 26.7 percent of defendant attorneys—and in a motion for summary judgment—reported by 25.3 and 24.4 percent, respectively.

Respondents were asked in question 51 to estimate, in general, what percentage of their practice is spent in electronic discovery-related activities. Given the findings already presented in this section, it is not surprising that the median response for both plaintiff and defendant attorneys was 5 percent. Those representing primarily plaintiffs gave a lower mean response, 6.4 percent, than either those representing plaintiffs and defendants about

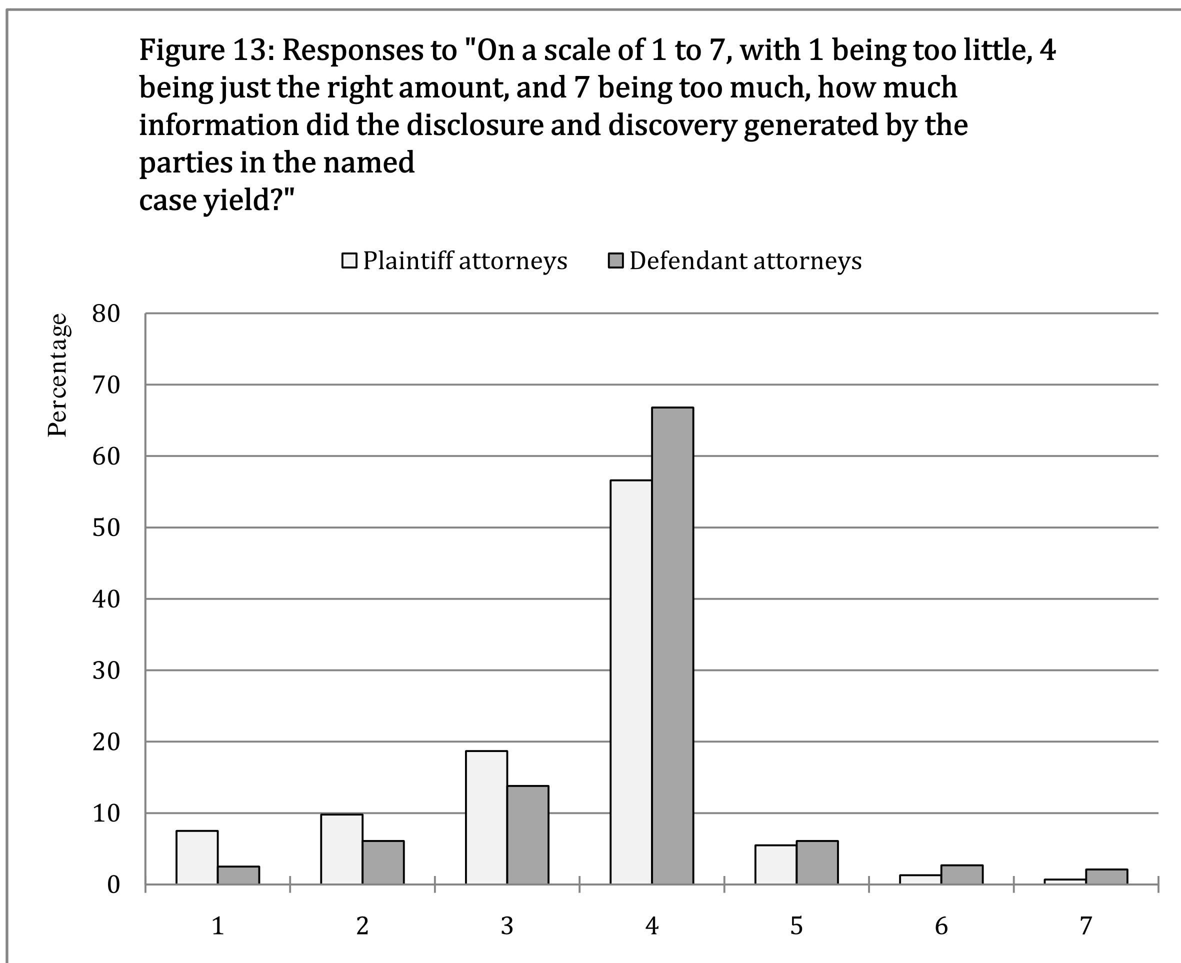
equally, 9.2 percent, or those primarily representing defendants, 9.0 percent. The 95th percentile for those representing primarily plaintiffs was 20 percent of their practice time spent in electronic discovery-related activities; for those representing both about equally, it was 30 percent; and for those representing primarily defendants, it was 25 percent. The 10th percentile response was 1 percent for those primarily representing defendants, 0.5 percent for those representing both about equally, and 0 (zero) for those representing primarily plaintiffs.

In sum, a party requested production of ESI in 30 to 40 percent of the sampled cases with one or more reported type of discovery—in other words, in less than a majority of cases with discovery. Moreover, no disputes over electronic discovery occurred in a large percentage of those cases. Half of attorneys in the closed cases with some discovery activity reported that they spend no more than 5 percent of their overall practice in electronic discovery-related activities.

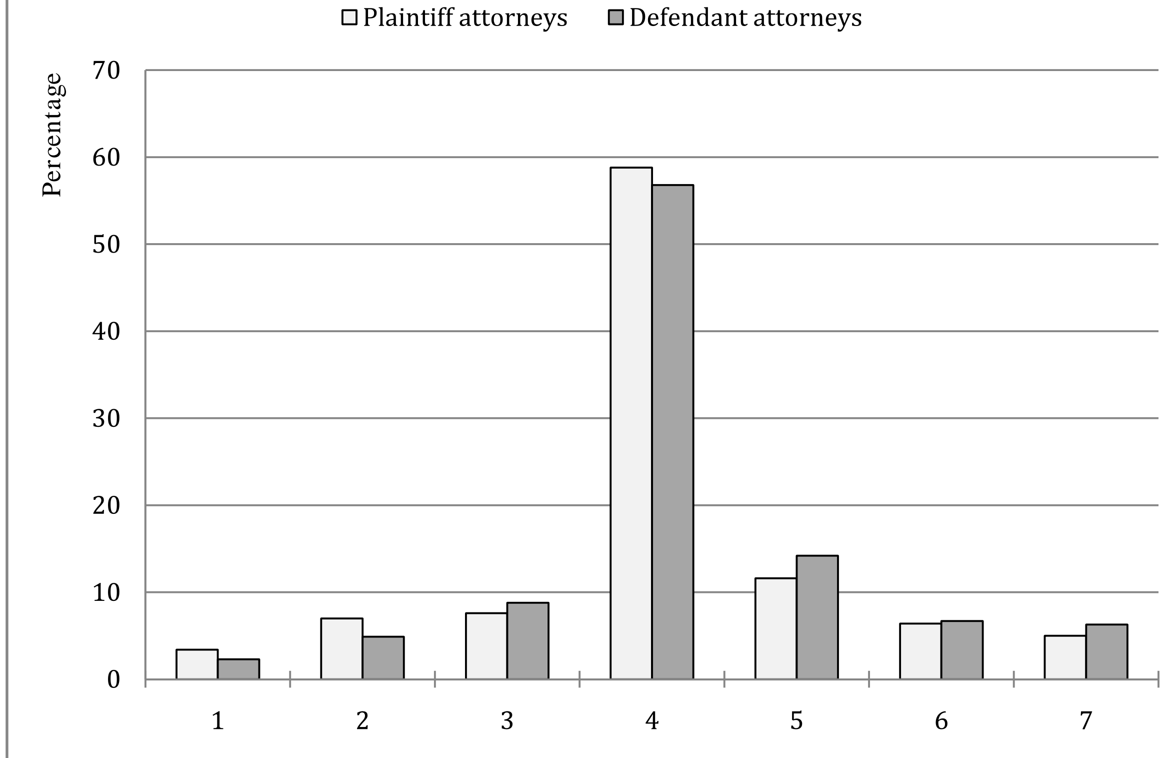
The next report to the Committee will include information on the volume of ESI produced by parties in the electronic discovery cases.

IV. Attorneys' Evaluation of Discovery in the Closed Cases

Respondents were asked to rate the information generated by the parties in discovery in the closed case on a 7-point scale, with 1 being too little, 4 being just the right amount, and 7 being too much. The distribution of responses is displayed in Figure 13. Both plaintiff and defendant attorneys tended to answer "just the right amount"; 56.6 and 66.8 percent, respectively, gave that answer. As can be seen in the figure, plaintiff attorneys (36 percent) were more likely to rate the information generated as too little (in the range of 1-3) than defendant attorneys (22.4 percent), and defendant attorneys (10.9 percent) were slightly more likely to rate the information generated as too much (in the range of 5-7) than plaintiff attorneys (7.5 percent).



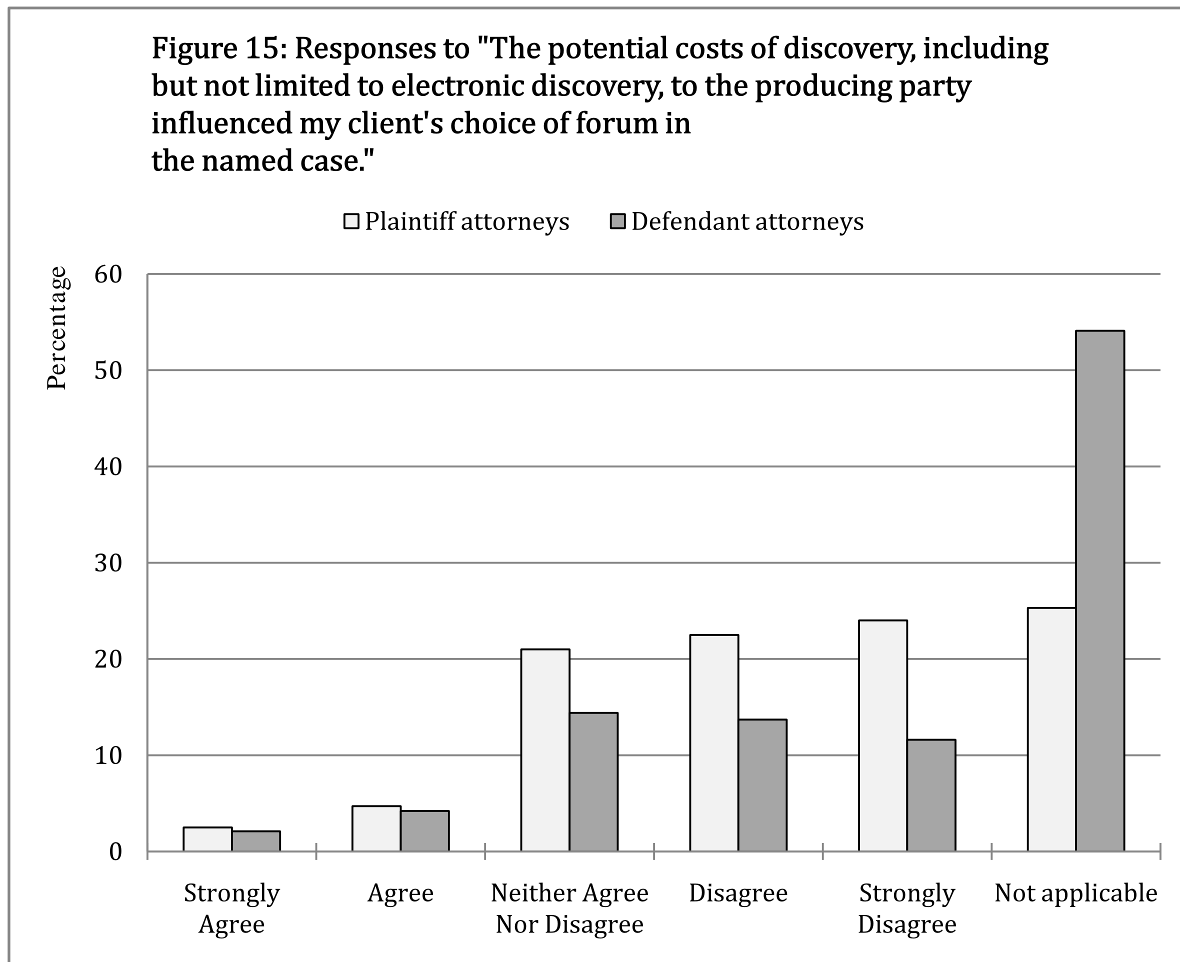
Respondents were asked to compare the costs of discovery with their clients' stakes in the closed case on a 7-point scale, with 1 being too little, 4 being just the right amount, and 7 being too much. The distribution of responses is displayed in Figure 14. As with the previous question, both plaintiff and defendant attorneys tended to answer, "just the right amount"; 58.8 and 56.8 percent, respectively, gave that answer.



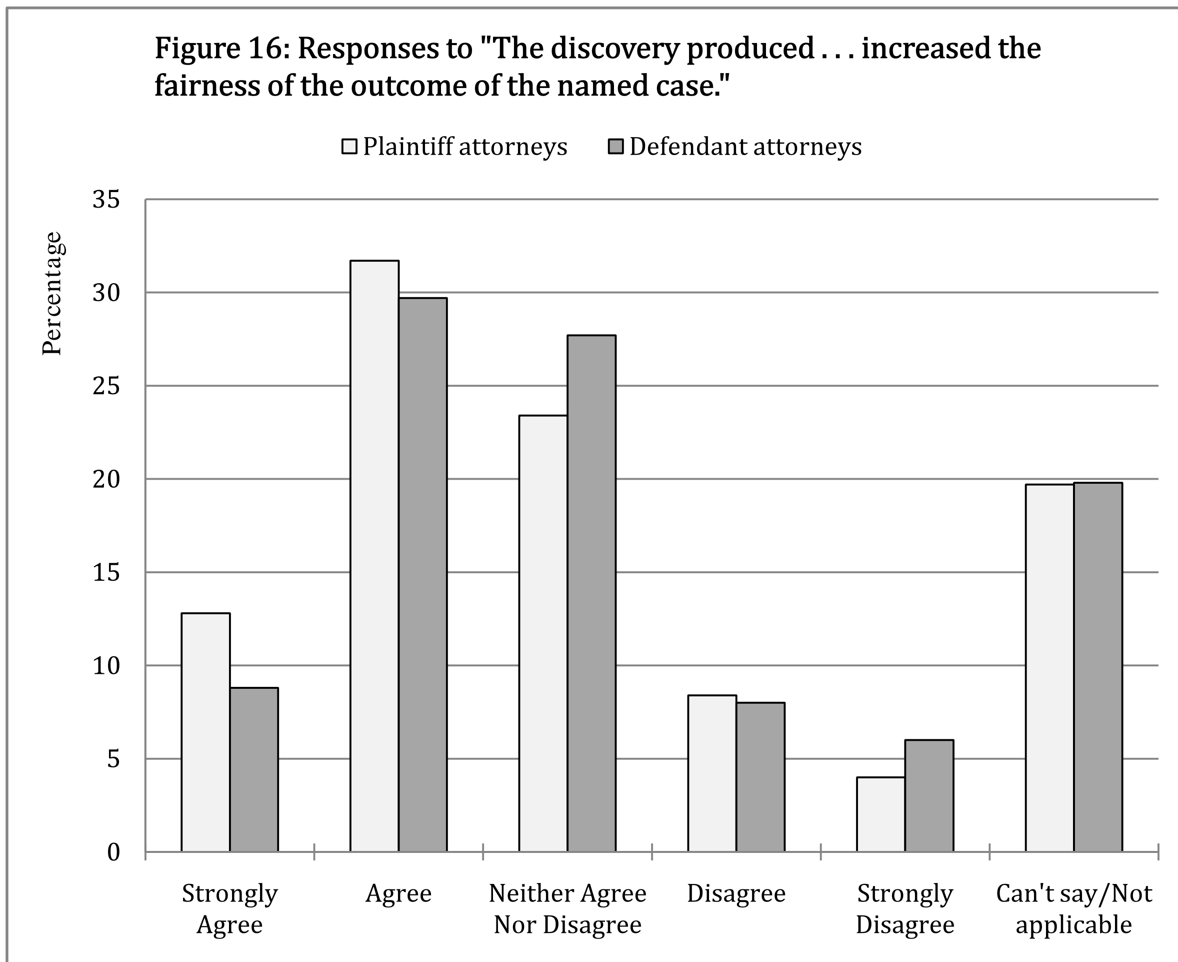
Although more than half of respondents indicated that the costs of discovery were "just right" relative to their clients' stakes in the closed case, 27.2 percent of defendant attorneys and 23 percent of plaintiff attorneys indicated that the costs of discovery were too much relative to their client's stakes (in the range of 5-7). By comparison, 18 percent of defendant attorneys and 16 percent of plaintiff attorneys rated the cost comparison as "too little" (in the range of 1-3).

Respondents were asked a battery of questions about the effects of discovery in the closed case. The first such question was whether the potential costs of discovery to the producing party influenced the client's choice of forum. The distribution of responses is displayed in Figure 15. As one might expect, defendant attorneys tended to answer this question as "not applicable" (54.1 percent). Fully 46.5 percent of plaintiff attorneys disagreed or disagreed strongly with the statement. Only 7.2 percent of plaintiff attorneys and 6.3 percent of defendant attorneys agreed or strongly agreed with the statement.[8]

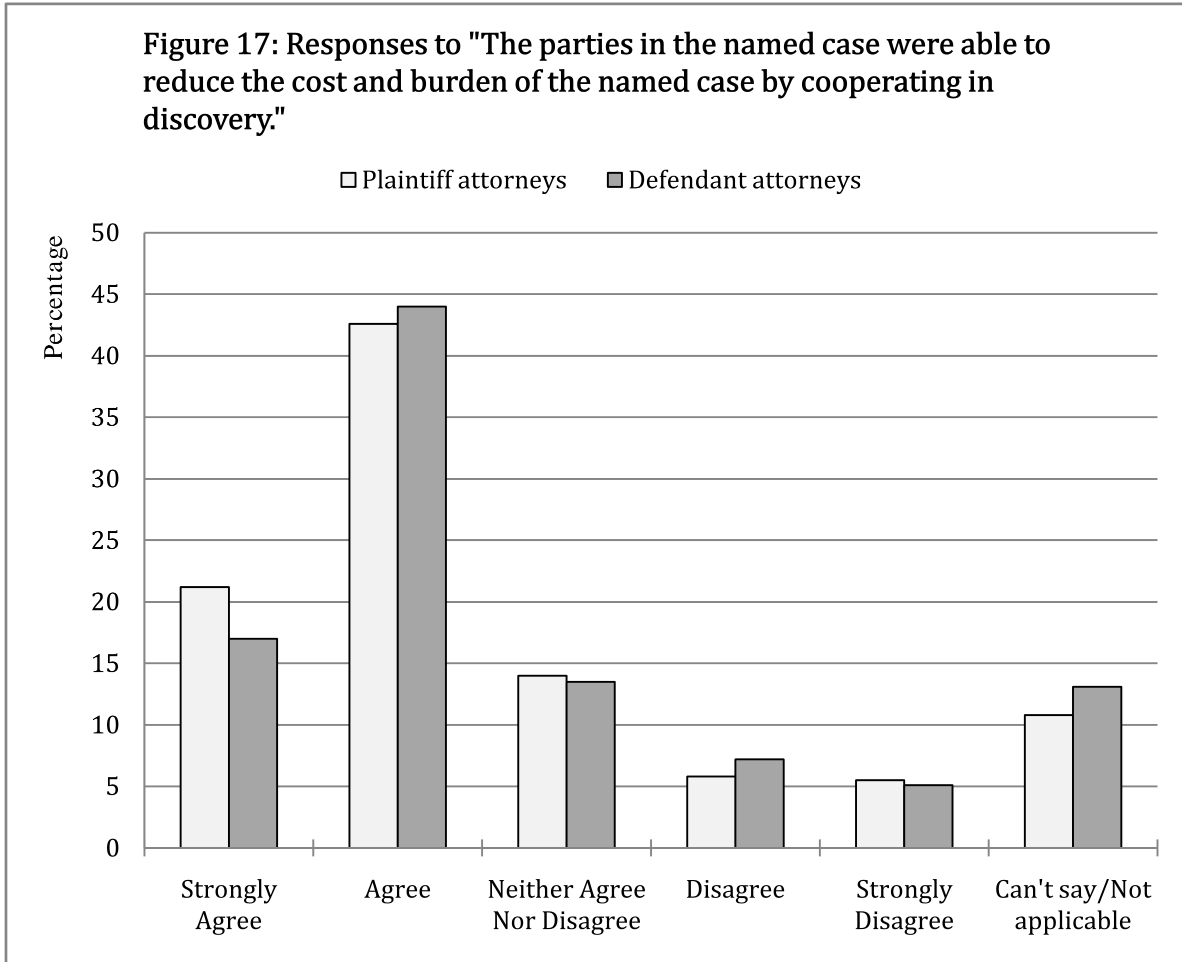
[8] *Cf.* Thomas E. Willging & Shannon R. Wheatman, An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation 18 & Table 2 (Federal Judicial Center 2005) (finding that the favorableness of discovery rules was a "secondary factor" affecting plaintiff attorneys' choice of forum, reported in 28 percent of state filings and 16 percent of federal filings).



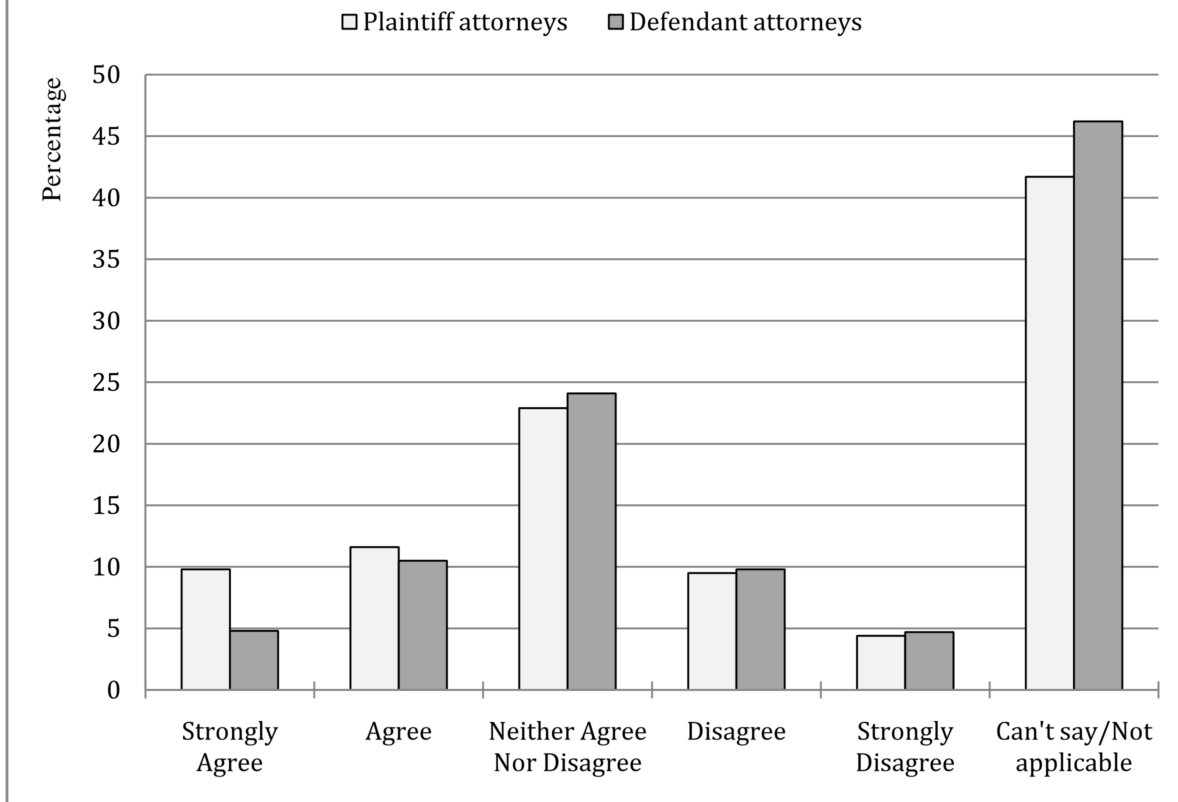
Next, respondents were asked whether the discovery produced in the closed case increased the fairness of the outcome. The distribution of responses is displayed in Figure 16. Fully 44.5 percent of plaintiff attorneys and 38.5 percent of defendant attorneys agreed or strongly agreed with the statement; only 12.4 percent of plaintiff attorneys and 14 percent of defendant attorneys disagreed or strongly disagreed with the statement. However, it is interesting that a large percentage of both groups refused to answer. About 1 respondent in 5 (19.7 and 19.8 percent, respectively) declined to answer, and almost 1 in 4 (23.4 and 27.7 percent) neither agreed nor disagreed. In other words, 43.1 percent of plaintiff attorneys and 47.5 percent of defendant attorneys—a plurality of defendant attorneys and a near plurality of plaintiff attorneys—did not express an opinion as to the effects of discovery on the fairness of the closed case's outcome.



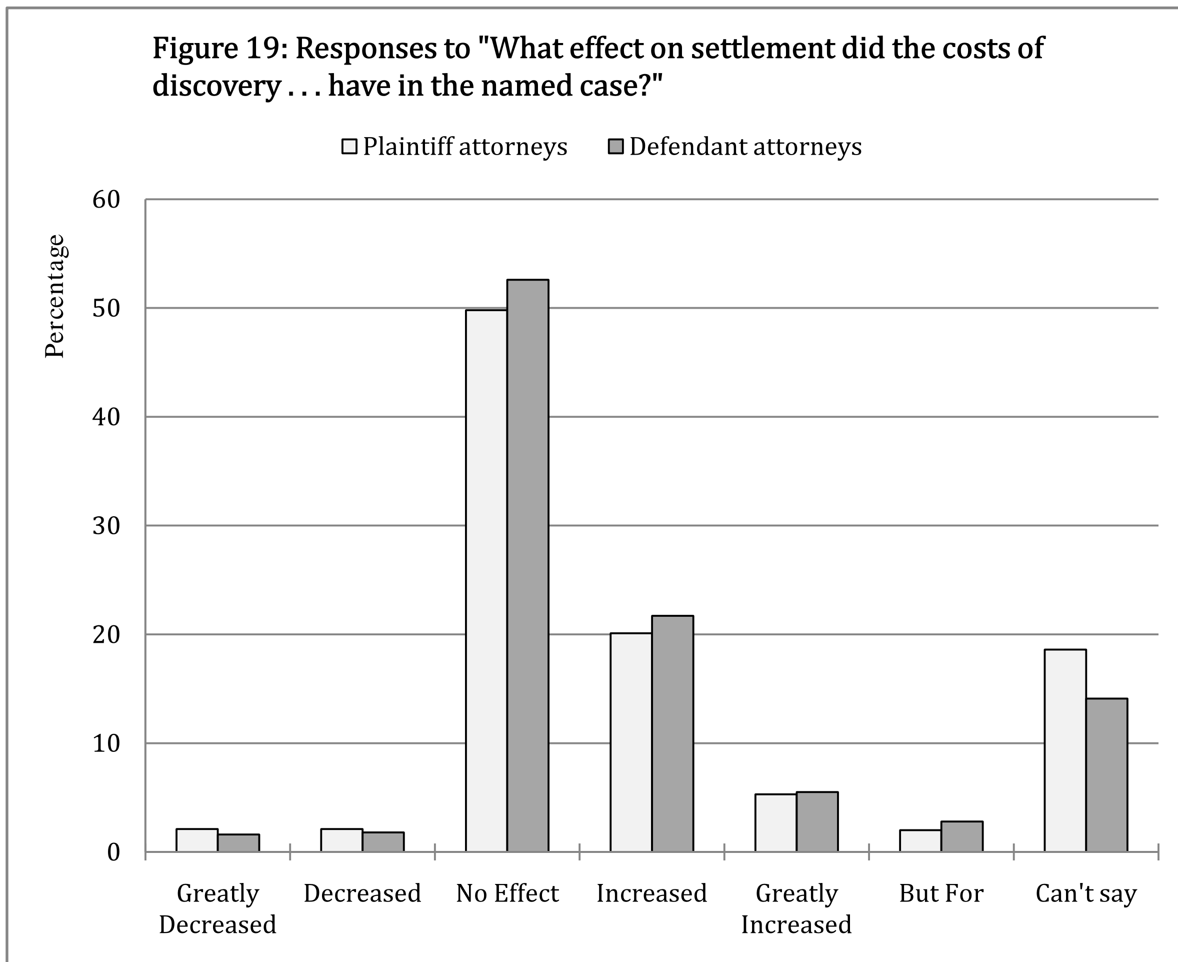
The next two questions asked respondents about the parties' conduct with respect to discovery. First respondents were asked whether the parties were able to reduce the cost and burden of discovery through cooperation. The distribution of responses is displayed in Figure 17. As the figure clearly shows, respondents tended to agree or strongly agree with this statement; 63.8 percent of plaintiff attorneys and 61 percent of defendant attorneys agreed or strongly agreed. Only 11.3 and 12.3 percent, respectively, disagreed or strongly disagreed. About 1 respondent in 4 either declined to answer or did not express an opinion.



The second question on the parties' conduct asked whether the parties *would have* saved significant time and money had they cooperated in discovery. The distribution of responses is displayed in Figure 18. Given the answers to the previous question, it is not surprising that many respondents found this question "Not applicable"—41.7 of plaintiff attorneys and 46.2 percent of defendant attorneys. These are, presumably, the respondents who indicated that the parties in fact reduced their costs by cooperating in discovery in the closed case. Still, 21.4 percent of plaintiff attorneys and 15.3 percent of defendant attorneys agreed or strongly agreed; and 13.9 and 14.5 percent, respectively, disagreed or disagreed strongly.



Respondents were next asked how the costs of discovery, including electronic discovery, affected the likelihood of the case settling. Figure 19 shows plaintiff and defendant attorney responses to this question in all cases in which there was at least one reported discovery event; these responses include cases that did not settle. By far, the largest response category for both plaintiff attorneys (49.8 percent) and defendant attorneys (52.6 percent) was "no effect." But 20.1 percent of plaintiff attorneys reported that the costs of discovery increased the likelihood of settlement, 5.3 percent reported that the costs greatly increased the likelihood of settlement, and 2 percent reported that the closed case "would not have settled but for the cost of discovery." Similarly, 21.7 percent of defendant attorneys reported that discovery costs increased the likelihood of settlement, 5.5 percent reported that the costs greatly increased the likelihood of settlement, and 2.8 percent reported that the closed case "would not have settled but for the costs of discovery." In sum, 27.4 percent of plaintiff attorneys and 30 percent of defendant attorneys indicated that the costs of discovery increased, to some extent, the likelihood of settlement in the closed case. Only 4.2 percent and 3.4 percent, respectively, indicated that the costs of discovery decreased or greatly decreased the likelihood of settlement.



Do these findings change if we limit the analysis to cases that were reported as settled by respondents? If we restrict the analysis to cases reported as settled ($n = 1{,}304$), the percentage of cases in which respondents report that the costs of discovery increased the likelihood of settlement increases for both plaintiff attorneys and defendant attorneys. Fully 35.5 percent of plaintiff attorneys in settled cases reported that the costs of discovery increased or greatly increased the likelihood of settlement, or caused the case to settle; the comparable figure for defendant attorneys was 39.9 percent. However, even among settled cases, the most common response for both plaintiff attorneys (48.2 percent) and defendant attorneys (47.3 percent) is that the costs of discovery had no effect on the likelihood of settlement in the closed case.

V. Attorney Estimates of Costs in the Closed Cases

Respondents were asked, in question 27, to estimate the total litigation costs for their firms and/or clients in the closed case, including the costs of discovery and any hourly fees for attorneys or paralegals. If the case was handled on a contingency-fee basis, they were asked to estimate the total litigation costs to the firm. Table 4first displays plaintiff attorneys' costs for all respondents providing cost information in cases with at least one type of discovery reported, then breaks down the costs into the following categories: no electronic discovery request in the closed case; any electronic discovery request in the closed case; electronic discovery case with the client as a producing party only; the client as a requesting party only; the client as both a producing and requesting party; five or fewer types of discovery reported in the closed case; and more than five types of discovery reported in the closed case.

Table 4: Plaintiff attorneys' reported costs, cases with at least one reported type of discovery

Category of Respondents		Reported Costs (in dollars)	*N*
All	Median	15,000	1,033
	10th percentile	1,600	
	95th percentile	280,000	
No electronic discovery	Median	8,126	517
	10th percentile	1,000	
	95th percentile	95,000	
Any electronic discovery	Median	30,000	451
	10th percentile	3,000	
	95th percentile	500,000	
Producing party only	Median	40,000	23
	10th percentile	2,500	
	95th percentile	400,000	
Requesting party only	Median	20,000	245
	10th percentile	3,000	
	95th percentile	280,000	
Producing and requesting party	Median	65,000	181
	10th percentile	5,000	
	95th percentile	850,000	
Five or fewer types of discovery reported	Median	10,000	489
	10th percentile	1,000	
	95th percentile	150,000	
More than five types of discovery reported	Median	20,000	544
	10th percentile	2,500	
	95th percentile	500,000	

The median cost reported by all plaintiff attorneys, in cases with at least one reported type of discovery, was $15,000. The 10th percentile was $1,600, and the 95th percentile was $280,000. The 1997 study found that the comparable figures were $10,000, $2,000, and $200,000, respectively.[9] Adjusted for inflation (2008 dollars), the comparable figures would be $13,363, $2,673, and $267,250, respectively. Although two studies, separated by twelve years, do not provide adequate information from which to establish a trend, comparing these cost estimates, the median estimate in 2009 exceeds the inflation-adjusted 1997 estimate by 12 percent, and the 95th percentile estimate exceeds the inflation-adjusted 1997 estimate by about 5 percent. The 10th percentile estimate is lower than the non-inflation-adjusted estimate from 1997.

As shown in Table 4, plaintiff attorneys reported that cases with electronic discovery requests were more expensive, at the median, than cases with no such requests. In cases without electronic discovery requests, the median reported cost was $8,126; the median reported cost, to the plaintiff, in cases with electronic discovery requests was $30,000. Among electronic discovery cases, the highest reported costs occurred in cases in which the plaintiff was both a producing and requesting party—$65,000 at the median. Costs were also higher in cases with more than five reported types of discovery—$20,000 at the median—than in cases with five or fewer reported types of discovery—$10,000.

Table 5 displays defendant attorneys' reports of costs, broken out in a similar fashion. The median cost reported by all defendant attorneys in cases with at least one reported type of discovery was $20,000. The 10th percentile was $5,000, and the 95th percentile was $300,000. The 1997 study found that the comparable figures were, at the median, $15,000, which when adjusted for inflation is about $20,043; the 10th percentile was $3,000, or $4,009 adjusted for inflation; and the 95th percentile was $150,000, or $200,438 adjusted for inflation. The median figure in Table 5, in short, is *slightly* lower than the 1997 median adjusted for inflation; the 10th and 95th percentiles, on the other hand, are larger by 25 and 50 percent, respectively.

Once again, cases in which an electronic discovery request was made were more expensive than those in which no such request was made—defendant attorneys reported median costs of $40,000 in electronic discovery cases, compared with $15,000 in cases without electronic discovery. Moreover, defendant attorneys reported the highest costs in electronic discovery cases when they were representing a party that both produced and requested electronic discovery—$60,000 at the median, compared with $25,000 at the median for producing parties only and $20,000 for requesting parties only. And, as in Table 4, cases with more than five reported discovery events were more costly than cases with five or fewer reported discovery events—$35,000 compared with $15,000.

[9] *Discovery and Disclosure*, *supra* note 3, at 15 (Table 3).

Table 5: Defendant attorneys' reported costs, cases with at least one reported type of discovery

Category of Respondents		Reported Costs (in dollars)	*N*
All	Median 10th percentile 95th percentile	20,000 5,000 300,000	945
No electronic discovery	Median 10th percentile 95th percentile	15,000 5,000 200,000	503
Any electronic discovery	Median 10th percentile 95th percentile	40,000 6,214 600,000	385
Producing party only	Median 10th percentile 95th percentile	25,000 5,000 350,000	136
Requesting party only	Median 10th percentile 95th percentile	20,000 4,000 150,000	51
Producing and requesting party	Median 10th percentile 95th percentile	60,000 10,000 991,900	197
Five or fewer types of discovery reported	Median 10th percentile 95th percentile	15,000 4,000 250,000	458
More than five types of discovery reported	Median 10th percentile 95th percentile	35,000 7,500 400,000	487

Respondents were also asked to estimate what percentage of the total litigation costs were incurred in requesting and/or producing disclosure and/or discovery, including but not limited to the discovery of electronically stored information (question 28). Plaintiff attorney responses in cases with at least one reported type of discovery are summarized in Table 6. The median response for all plaintiff attorneys providing such information was 20 percent; the 10th percentile was 0.1 percent, and the 95th percentile was 80 percent. It should be noted that almost 10 percent of plaintiff attorney respondents offering an estimate in response to this question answered 0 (zero). These figures are substantially lower than the comparable figures from the 1997 study, which found that the median for plaintiff attorneys was 50 percent.[10]

There is not much variation in the median percentage of total litigation costs associated with discovery among the subgroups shown in Table 6. In cases with an electronic

[10] *Id.* at 15 (Table 4).

discovery request, discovery accounts for 25 percent of total litigation costs, at the median, compared with 20 percent in a case without a request. Producing and requesting parties reported a higher median percentage (30 percent) than producing parties only (25 percent) or requesting parties only (25 percent), but again, the difference is 5 percentage points. Similarly, higher levels of discovery led to a 5 percentage point higher estimate of discovery costs as a share of total costs.

Table 6: Plaintiff attorneys' estimate of percentage of costs incurred in discovery, cases with at least one reported type of discovery

Category of Respondents		Estimate (%)	*N*
All	Median	20.0	1,031
	10th percentile	0.1	
	95th percentile	80.0	
No electronic discovery	Median	20.0	515
	10th percentile	0.0	
	95th percentile	80.0	
Any electronic discovery	Median	25.0	458
	10th percentile	5.0	
	95th percentile	80.0	
Producing party only	Median	25.0	22
	10th percentile	10.0	
	95th percentile	75.0	
Requesting party only	Median	25.0	247
	10th percentile	1.0	
	95th percentile	90.0	
Producing and requesting party	Median	30.0	188
	10th percentile	5.0	
	95th percentile	75.0	
Five or fewer types of discovery reported	Median	20.0	480
	10th percentile	0.0	
	95th percentile	80.0	
More than five types of discovery reported	Median	25.0	551
	10th percentile	3.0	
	95th percentile	80.0	

Defendant attorney responses to the same question are summarized in Table 7. Defendant attorneys estimated a higher median percentage of total litigation costs associated with discovery, 27 percent, than did plaintiff attorneys, 20 percent. The 10th percentile for defendant attorneys was 5 percent, and the 95th percentile was 80 percent. Almost 5 percent of respondents offering a response estimated the percentage of total costs associated with discovery at 0 (zero). Once again, these figures are substantially lower than the estimates in the 1997 study, which found that the median estimate for defendant attorneys was 50 percent of total litigation costs associated with discovery.

Table 7: Defendant attorneys' estimate of percentage of costs incurred in discovery, cases with at least one reported type of discovery

Category of Respondents		Estimate (%)	*N*
All	Median	27.0	989
	10th percentile	5.0	
	95th percentile	80.0	
No electronic discovery	Median	25.0	532
	10th percentile	3.0	
	95th percentile	80.0	
Any electronic discovery	Median	32.5	397
	10th percentile	10.0	
	95th percentile	80.0	
Producing party only	Median	40.0	140
	10th percentile	10.0	
	95th percentile	80.0	
Requesting party only	Median	40.0	53
	10th percentile	7.0	
	95th percentile	75.0	
Producing and requesting party	Median	30.0	204
	10th percentile	10.0	
	95th percentile	80.0	
Five or fewer types of discovery reported	Median	25.0	483
	10th percentile	2.0	
	95th percentile	75.0	
More than five types of discovery reported	Median	35.0	506
	10th percentile	10.0	
	95th percentile	80.0	

As with the plaintiff attorneys' estimates, electronic discovery in a case increased the median estimate of the percentage of total costs associated with discovery, but not substantially. For cases without a reported electronic discovery request, the median estimate was 25 percent of total costs incurred in discovery; for cases with such a request, the median estimate was 32.5 percent. Producing and requesting parties provided a lower median estimate (30 percent) than producing only or requesting only parties did (40 percent). Cases with more types of discovery produced higher estimates of the percentage of total costs associated with discovery, 35 percent compared with 25 percent.

To determine whether discovery costs in general are excessive, from the respondent's point of view, respondents were asked, in Question 78, to specify, in the typical case in federal court, the proper ratio of the costs of discovery to total litigation costs. The median response for plaintiff attorneys was 33 percent, and the median response for defendant attorneys was 40 percent. Surprisingly, the median estimates of discovery costs to total litigation costs provided by survey respondents were *lower* than the median responses to the normative question.

Respondents reporting an electronic discovery request in the closed case were asked to estimate the percentage of *discovery costs* that were incurred in producing or requesting electronic discovery. Table 8 summarizes this information for both plaintiff attorneys and defendant attorneys. The median estimate of electronic discovery costs as a percentage of discovery costs in cases with an electronic discovery request was 5 percent for plaintiff attorneys and 10 percent for defendant attorneys. In other words, in half of the cases with an electronic discovery request (and for which respondents provided an estimate), electronic discovery costs accounted for just 5 percent of plaintiff attorneys' discovery costs and 10 percent of defendant attorneys' discovery costs. In 5 percent of the cases, the electronic discovery costs exceeded 72.6 percent of plaintiff attorneys' discovery costs and 75 percent of defendant attorneys' discovery costs.

The medians for the break-out groups in Table 8 are remarkably similar. Plaintiff attorneys provided a higher estimate when they represented a party that was both a producing and requesting party (10 percent), as compared with a producing only party (5 percent) or a requesting only party (5 percent). Defendant attorneys representing a producing only party or a producing and requesting party provided very similar estimates of electronic discovery costs as a share of total discovery costs, 10 percent at the median; requesting parties reported a median of 4 percent.

Table 8: Attorneys' estimates of percentage of discovery costs incurred in electronic discovery; electronic discovery cases only

Category of Respondent		Estimate (%)	*N*
Plaintiff attorneys	Median 10th percentile 95th percentile	5.0 0.0 72.6	450
Defendant attorneys	Median 10th percentile 95th percentile	10.0 1.0 75.0	398
Plaintiff attorneys Producing party only	Median 10th percentile 95th percentile	5.0 0.0 95.0	22
Plaintiff attorneys Requesting party only	Median 10th percentile 95th percentile	5.0 0.0 50.0	243
Plaintiff attorneys Producing and requesting party	Median 10th percentile 95th percentile	10.0 0.5 75.0	183
Defendant attorneys Producing party only	Median 10th percentile 95th percentile	10.0 1.0 75.0	141
Defendant attorneys Requesting party only	Median 10th percentile 95th percentile	4.0 0.0 37.5	52
Defendant attorneys Producing and requesting party	Median 10th percentile 95th percentile	10.0 1.0 80.0	204

To compare these cost measures with the amount at stake in the underlying litigation, respondents were asked to estimate the best and worst "likely" outcomes, from the point of view of their clients. The question was drafted to parallel a similar question asked in the 1997 study. A measure of stakes was then calculated as the spread between the best outcome the client might hope for (largest gain or smallest loss) and the worst outcome that the client might legitimately fear (largest loss or smallest gain). Table 9 summarizes estimated stakes in plaintiff attorneys' and defendant attorneys' closed cases.

Table 9: Attorneys' estimates of the stakes; cases with one or more reported discovery types

Category of Respondent		Estimated stakes (in dollars)	*N*
Plaintiff attorneys	Median	160,000	923
	10th percentile	14,590	
	95th percentile	3,983,000	
Defendant attorneys	Median	200,000	916
	10th percentile	15,000	
	95th percentile	5,000,000	

The median estimate of stakes for plaintiff attorneys was $160,000, the 10th percentile was $14,590, and the 95th percentile was almost $4 million. In the 1997 study, the comparable figures were $125,000, or $167,031 in 2008 dollars; $2,100, or about $2,800 in 2008 dollars; and $3 million, which would be more than $4 million in 2008 dollars.[11] Plaintiffs attorneys' estimates of the stakes are relatively close, at the median and the 95th percentile, to the inflation-adjusted estimates. At the 10th percentile, the current estimate is much larger than the comparable 1997 estimate.

The median estimate of stakes for defendant attorneys was $200,000, the 10th percentile was $15,000, and the 95th percentile was $5 million. The comparable figures from the 1997 study were $200,000, or $267,250 in 2008 dollars; $10,000, or $13,362 in 2008 dollars; and $5 million, which would be more than $7 million in 2008 dollars. The current estimates are substantially lower at the median and the 95th percentile than the inflation-adjusted 1997 estimates; the 10th percentile is slightly higher than the 1997 estimate.

Discovery costs can be expressed as a percentage of the stakes, as estimated by the respondent. The 1997 study found that the median ratio of discovery costs to stakes was 3 percent, for both plaintiff and defendant attorneys, and that the 95th percentile was 32 percent, for both plaintiff and defendant attorneys.[12] As shown in Table 10, plaintiff attorneys in the present study reported a median ratio of 1.6 percent in cases with at least one reported type of discovery, and defendant attorneys reported a median ratio of 3.3 percent. The 95th percentile was 25.0 percent for plaintiff attorneys and 30.5 percent for defendant attorneys.

[11] *Id.* at 16 (Table 5).
[12] *Id.* at 17 (Table 6).

Table 10: Ratio of attorneys' estimates of discovery costs to attorneys' estimates of the stakes; cases with one or more reported discovery types

Category of Respondent		Estimate (%)	*N*
Plaintiff attorneys	Median 10th percentile 95th percentile	1.6 0.0 25.0	829
Defendant attorneys	Median 10th percentile 95th percentile	3.3 0.2 30.5	916

In other words, in half of cases with some reported discovery, plaintiff attorneys reported that their clients' discovery costs represented no more than 1.6 percent of the clients' stakes in the case, and defendant attorneys reported that their clients' discovery costs represented no more than 3.3 percent of their clients' stakes. In less than 5 percent of cases with some reported discovery costs plaintiff attorneys reported discovery costs that exceeded 25 percent of the client's stakes. The comparable figure for defendant attorneys was higher—in 5 percent of cases, defendant attorneys reported discovery costs exceeding 30.5 percent of the client's stakes.

Question 42 asked respondents to compare the costs of discovery to the client's stakes in the closed case, on a 7-point scale.[13] Scores of 5-7 on that scale represented discovery costs that were perceived as "too much," scores of 1-3 were "too little," and a score of 4 was designated "just the right amount." For plaintiff attorneys responding "just the right amount," the median ratio of discovery costs to stakes was 1.2 ($n = 463$), and for defendant attorneys responding "just the right amount," the median ratio was 2.5 ($n = 415$). The median ratios for respondents answering "too little" were lower, for the most part, and the median ratios for respondents answering "too much" were higher. For defendant attorneys, the median ratio for responders answering 5 out of 7 ($n = 124$) was 5.7 percent; for 6 out of 7 ($n = 10.9$), 10.9 percent; and for 7 out of 7 ($n = 40$), 7.0 percent. For plaintiff attorneys, the median ratio for responders answering 5 out of 7 ($n = 101$) was 4.2 percent; for 6 out of 7 ($n = 52$), 5.2 percent; and for 7 out of 7 ($n = 47$), 3.4 percent.

Finally, respondents were asked to what extent their client was concerned about nonmonetary relief in the closed case or about possible consequences such as future litigation based on similar claims, legal precedent, or harm to reputation, among other things. The responses are summarized in Table 11, which presents the median cost, stakes, and ratio of discovery costs to stakes for each category of respondent.

[13] See Figure 14 and accompanying text, *supra*.

Table 11: Responses on the importance of nonmonetary relief or adverse consequences of litigation, with median costs and stakes

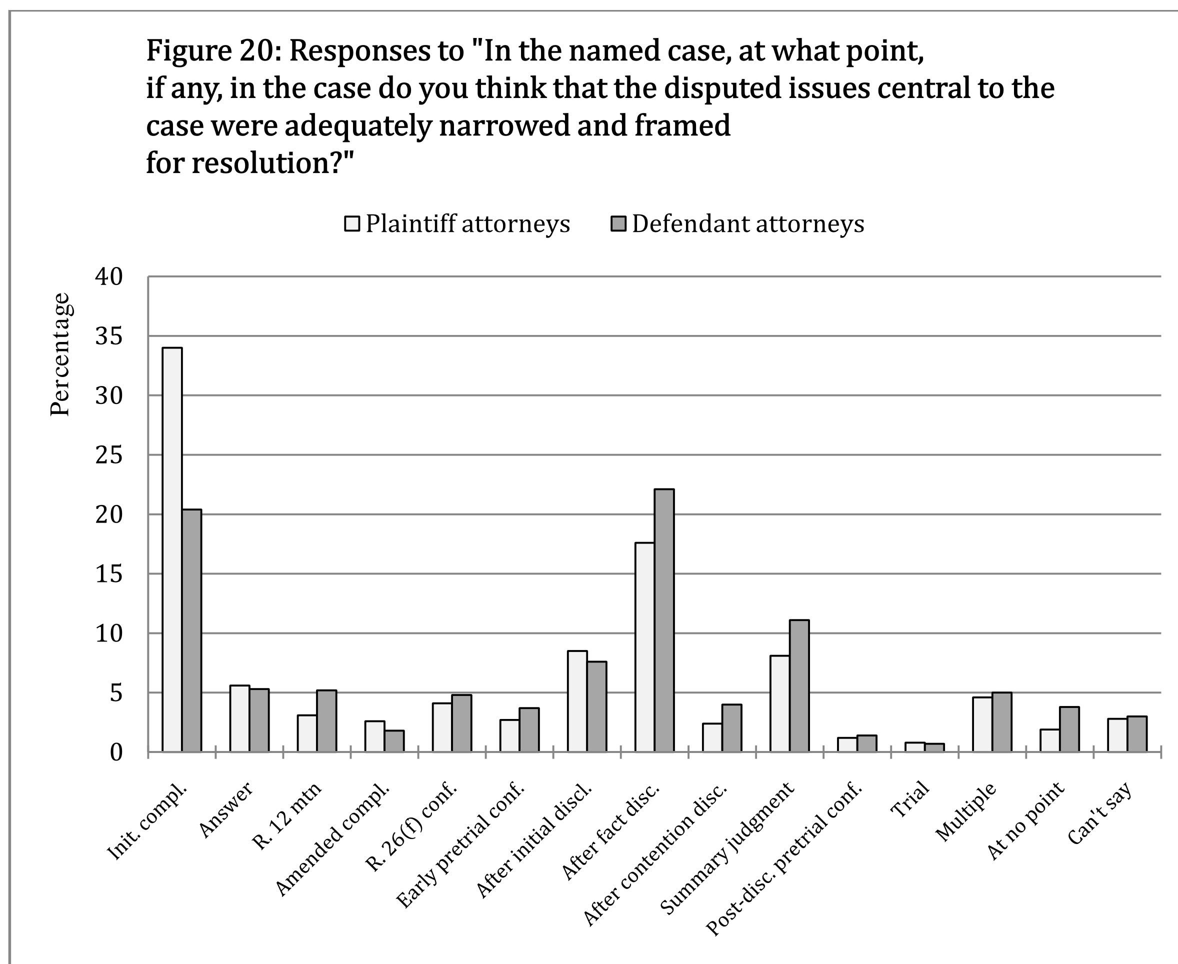
Category	Percentage	Median cost (in dollars)	Median stakes (in dollars)	Median Ratio Discovery: Stakes (%)
Plaintiff attorneys				
Dominant concern	11.0	40,000	150,000	2.3
Some concern	22.4	20,000	270,000	1.4
Little/no concern	59.3	10,000	150,000	1.5
Defendant attorneys				
Dominant concern	16.4	33,360	170,000	4.8
Some concern	35.9	25,000	221,000	3.0
Little/no concern	43.1	20,000	175,000	3.0

As Table 11 shows, defendant attorneys were more likely to report that nonmonetary relief and/or adverse consequences were of dominant or some concern to the client (52.3 percent) than were plaintiff attorneys (33.4 percent). Almost 6 in 10 plaintiff attorneys reported that nonmonetary relief and/or adverse consequences of the litigation were of little or no concern (59.3 percent). For both plaintiff attorneys and defendant attorneys, the highest median litigation costs were reported by respondents most concerned with nonmonetary relief and/or adverse consequences, and the lowest median litigation costs were reported by those least concerned. Those reporting that such concerns were dominant also reported the highest ratio of discovery costs to stakes—discovery costs equaled 2.3 percent of stakes at the median for plaintiff attorneys in this category and 4.8 percent of stakes at the median for defendant attorneys. The median stakes followed a different pattern, with the highest median stakes for both plaintiff attorneys and defendant attorneys reported for cases in which the client was somewhat concerned with nonmonetary relief and/or adverse consequences.

VI. Reform Proposals

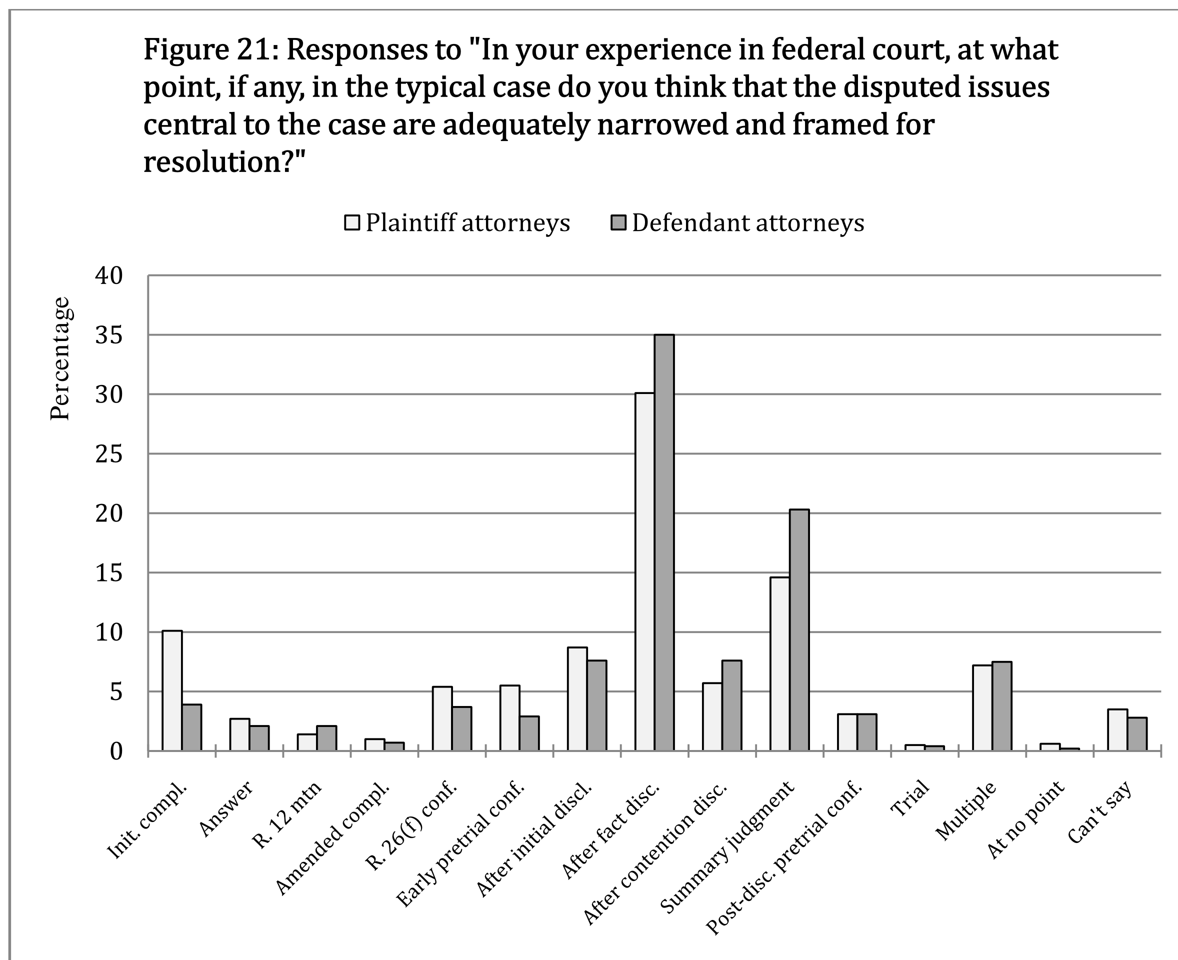
Respondents were asked a series of questions on two relatively common reform proposals—fact pleading and simplified procedures.

Question 56 asked respondents at what point, if any, the disputed issues central to the dispute in the named case were adequately narrowed and framed for resolution. The distribution of responses for cases in which there was at least one reported type of discovery is displayed in Figure 20.



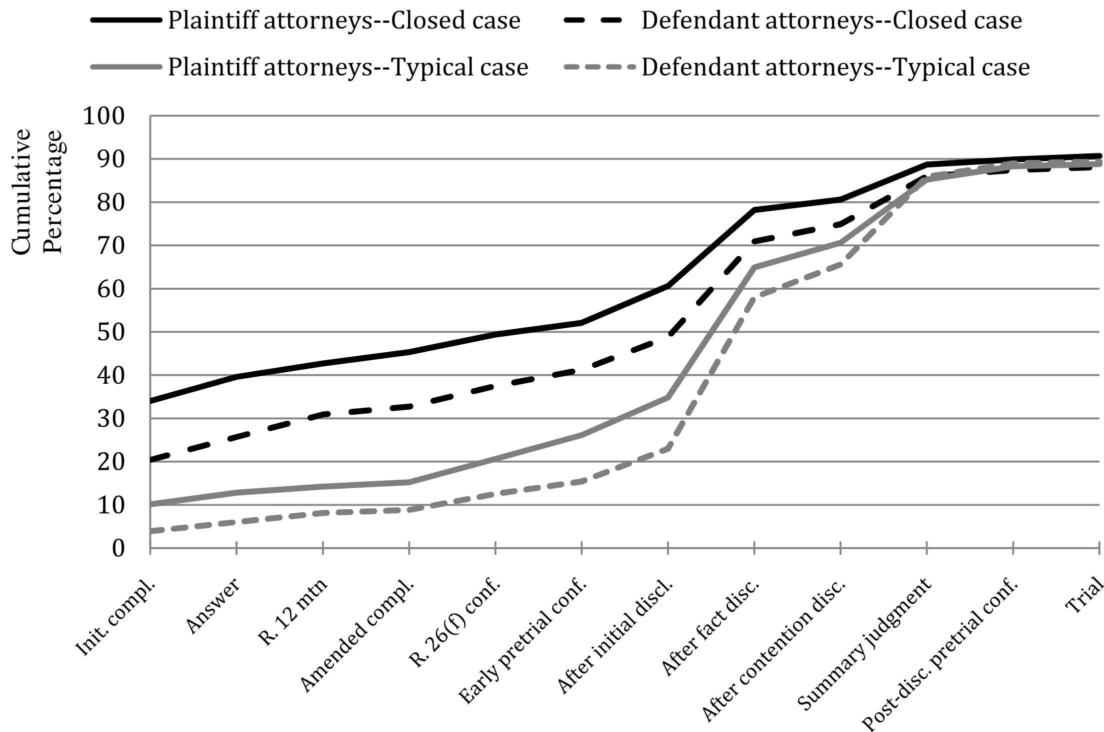
The most common response for plaintiff attorneys was the initial complaint, which was the response of 34 percent of this group. The next most common response for plaintiff attorneys was after fact discovery, at 17.6 percent. After fact discovery was the most common response for defendant attorneys, at 22.1 percent. Most surprising, however, is that the initial complaint was the next most common response among defendant attorneys, at 20.4 percent. Summary judgment (8.1 and 11.1 percent, respectively) and after initial disclosures (8.5 and 7.6 percent, respectively) were also relatively common responses.

Respondents were then asked (in question 57) at what point in the typical case, based on their experiences in federal court, are the disputed issues central to the case adequately narrowed and framed for resolution. The distribution of responses is displayed in Figure 21.



The responses for the typical case vary a great deal from those for the closed cases. The initial complaint was offered by only 10.1 percent of plaintiff attorneys and 3.9 percent of defendant attorneys—as opposed to 34 and 22.1 percent, respectively, in the previous figure. The most common response, for both groups, was after fact discovery, at 30.1 and 35 percent, respectively, followed by summary judgment, at 14.6 and 20.3 percent, respectively.

Figure 22 combines the information from the previous two figures, displaying the cumulative percentages of responses for plaintiff and defendant attorneys for the closed and typical case. Each line can be understood as the sum of responses (as percentages of all responses for that group) to that point on the horizontal axis. This figure illustrates at what point the issues central to resolving the cases have been adequately narrowed and framed for resolution.

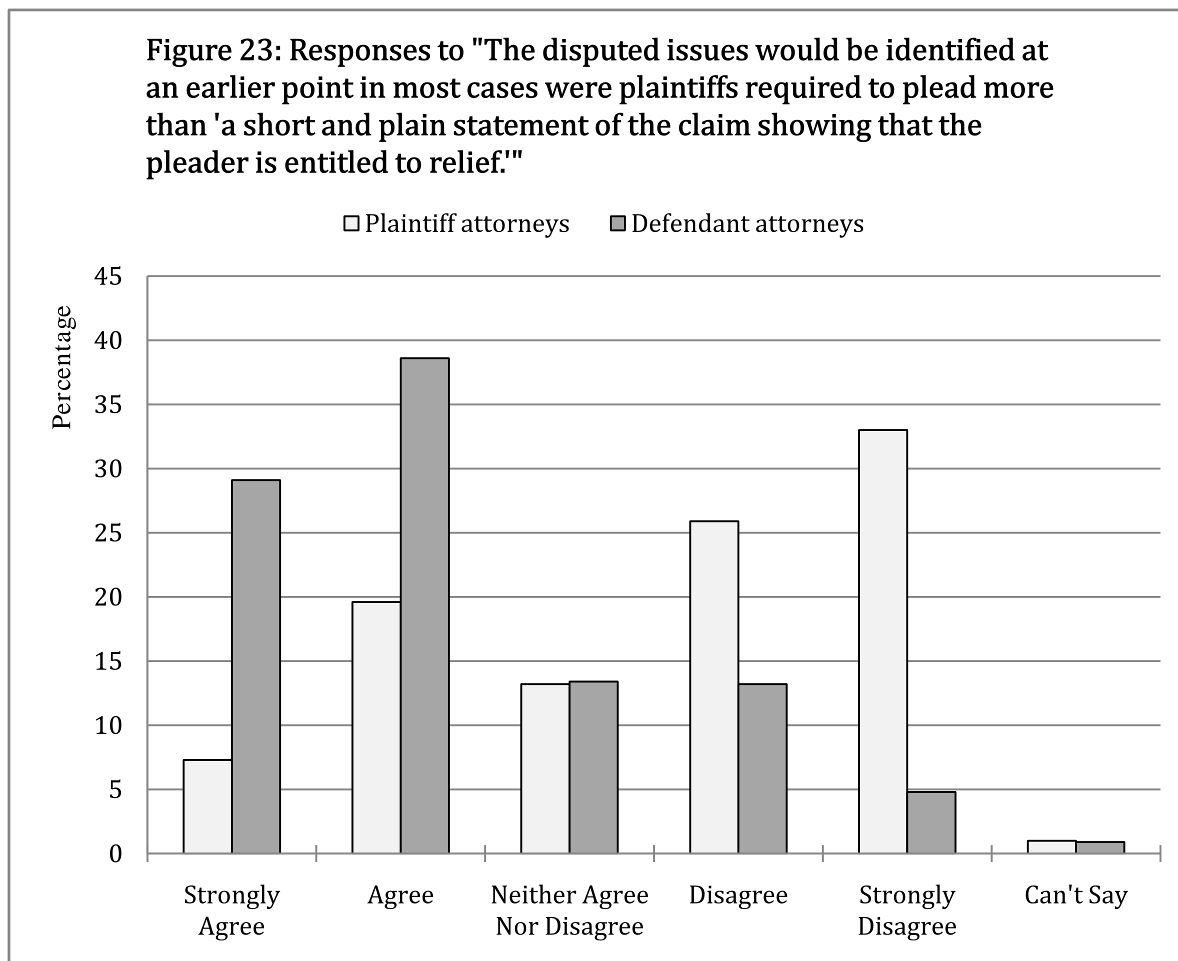


As shown in the previous figures, respondents reported that the issues central to the resolution of the closed case ("named case" in the survey) were adequately framed and narrowed much earlier than in the typical case in federal court. This figure also makes clear that plaintiff attorneys tend to perceive that the central issues are adequately framed and narrowed earlier in cases than do defendant attorneys. For example, by the time of initial disclosure of non-expert documents, more than 60 percent of plaintiff attorneys in the closed cases had reported that the issues had been adequately framed and narrowed, compared with about half of defendant attorneys. A similar gap exists between the two lines in the responses for the typical case.

In both the closed and typical cases, the lines for plaintiffs and defendants converge only late in the case—around summary judgment. By that time, for both the closed and typical case, 85 percent of respondents report that the central issues are adequately narrowed and framed for resolution. The biggest step increase in each line, however, occurs after fact discovery. As for the 10 percent of cases that are not included in the figure, these cases are those for which respondents declined to answer or chose "at no point" or "multiple points" as responses.

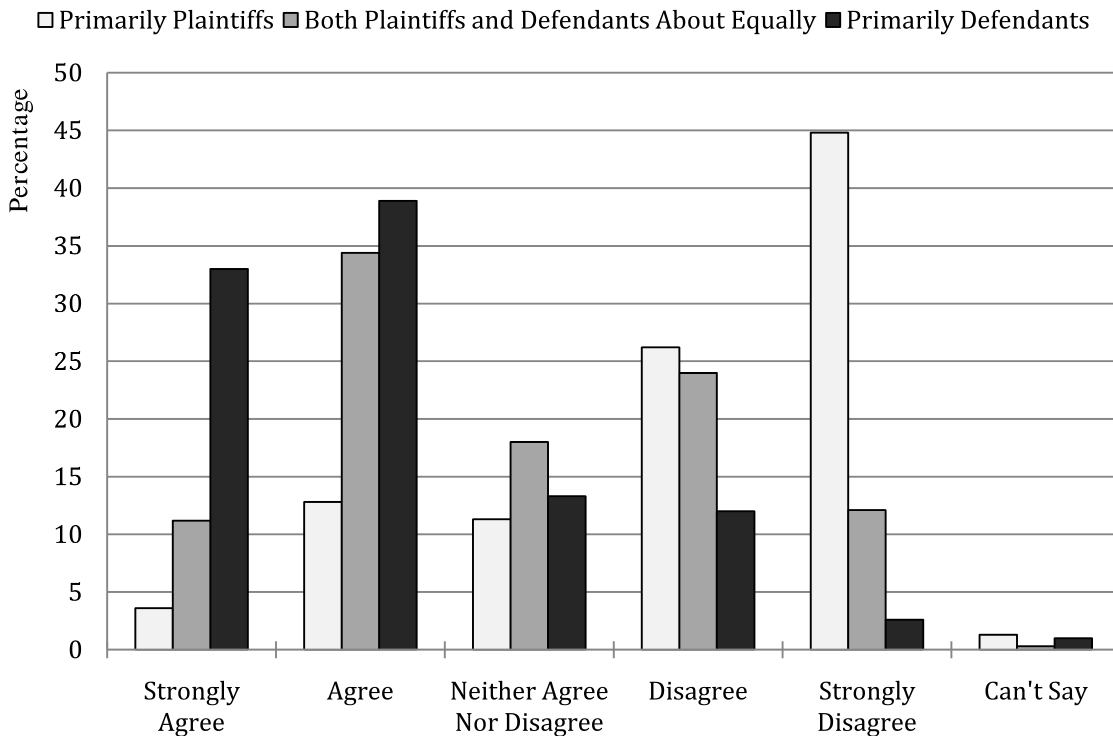
Question 58 then asked respondents whether the disputed issues would be identified at an earlier point in most cases if plaintiffs were required to plead more than "a short and

plain statement of the claim showing that the pleader is entitled to relief." The distribution of responses is displayed in Figure 23.



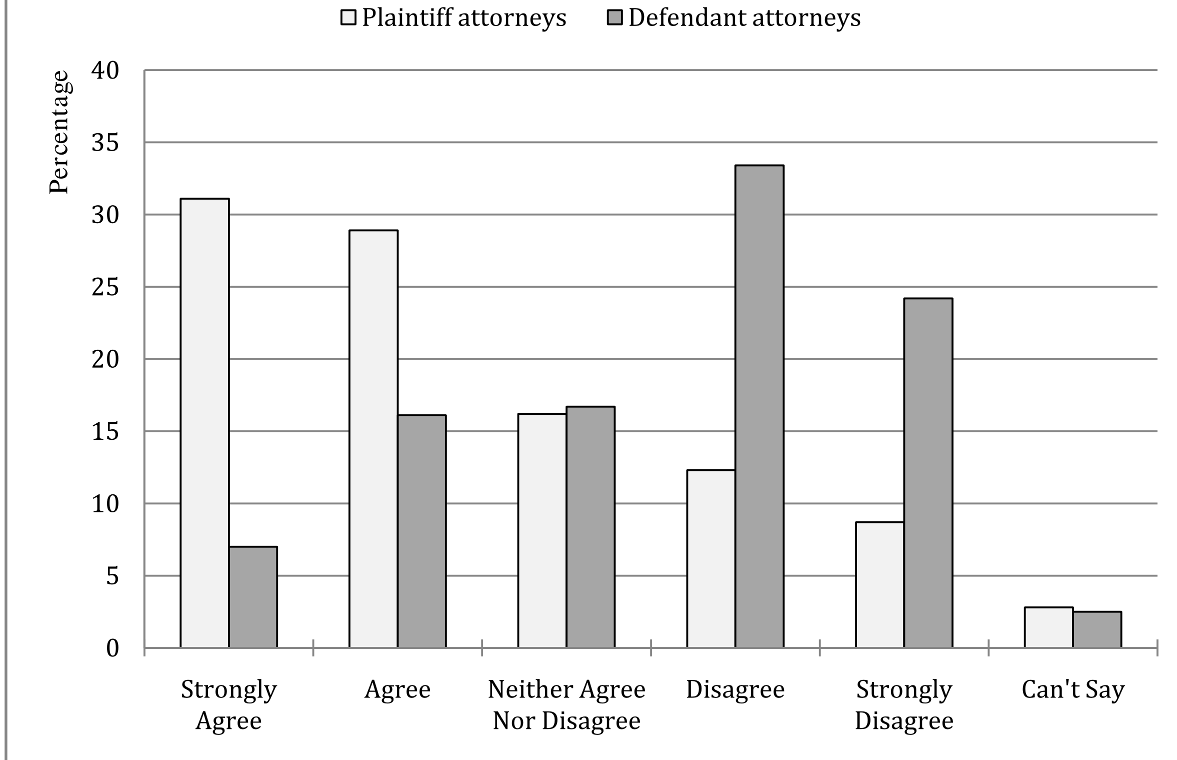
As one would expect, plaintiff attorneys tended to disagree (25.9 percent) and strongly disagree (33 percent), while defendant attorneys tended to agree (38.6 percent) and strongly agree (29.1 percent).

Given the divergence of opinions on this question, it may be useful to classify respondents according to whether, in their overall practice, they primarily represent plaintiffs, primarily represent defendants, or represent both plaintiffs and defendants about equally, instead of according to their role in the closed case included in the sample. This distribution of responses is displayed in Figure 24.



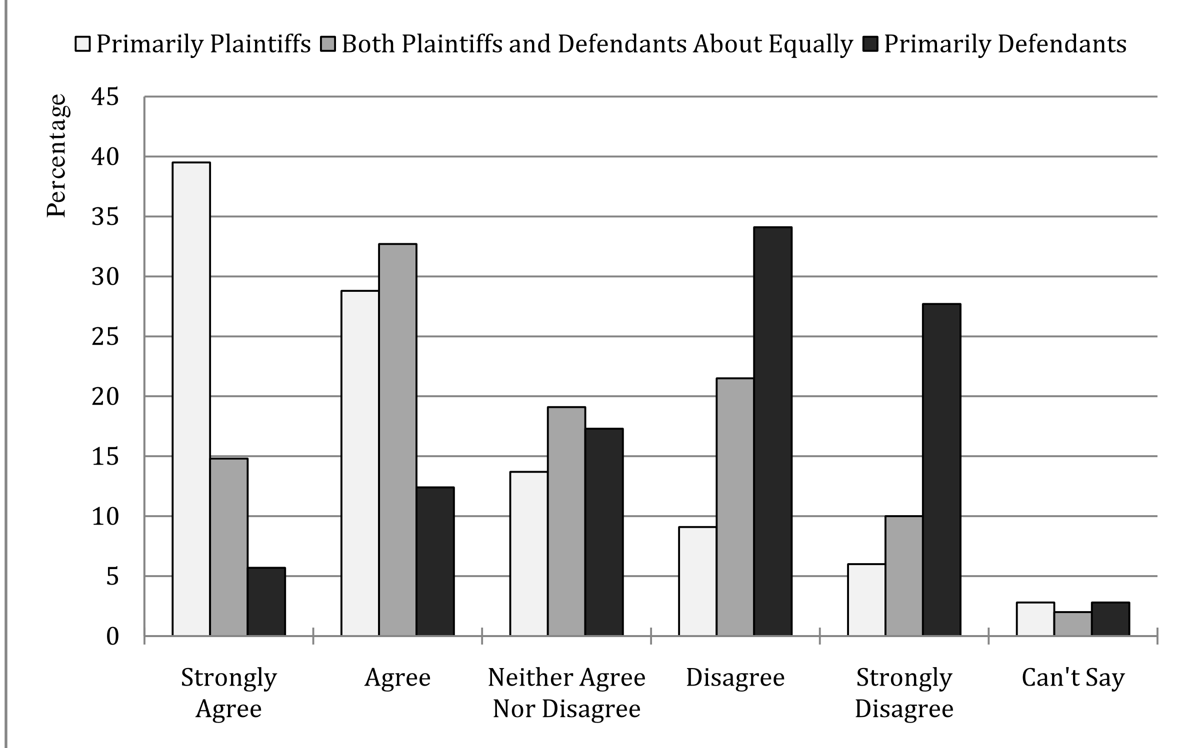
Respondents who represent primarily plaintiffs disagreed (26.2 percent) and strongly disagreed (44.8 percent) with the statement; respondents who represent primarily defendants agreed (38.9 percent) and strongly agreed (33 percent). But the most interesting group is composed of attorneys who reported that they represent plaintiffs and defendants about equally. This group of attorneys agreed (34.4 percent) or strongly agreed (11.2 percent) with the statement 45.6 percent of the time and disagreed (24 percent) or strongly disagreed (12.1 percent) with the statement 36.1 percent of the time. Among attorneys who represent both plaintiffs and defendants about equally, in short, the plurality agrees that disputed issues would be identified earlier with fact pleading.

Respondents were then asked whether the added burdens for plaintiffs would outweigh any benefits, even if raising the pleading standards would help to identify and frame disputed issues at an earlier stage in litigation. The distribution of responses is displayed in Figure 25.



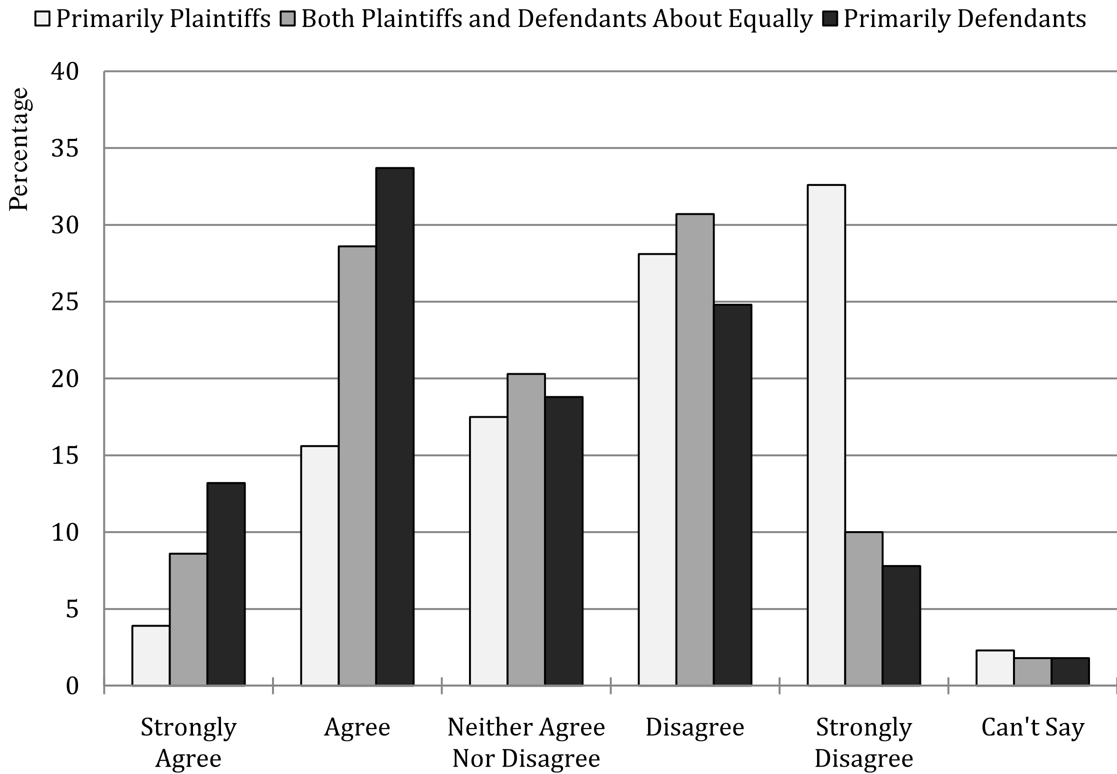
As in the previous figure, plaintiff and defendant attorneys expressed very different opinions regarding the potential burdens of fact pleading on plaintiffs. Plaintiff attorneys tended to agree (28.9 percent) or strongly agree (31.1 percent), while defendant attorneys tended to disagree (33.4 percent) or strongly disagree (24.2 percent).

Again, it may be useful to examine the opinions of attorneys who reported that they represent plaintiffs and defendants about equally. The distribution of responses is displayed in Figure 26. Respondents representing primarily plaintiffs agreed (28.8 percent) or strongly agreed (39.5 percent) with the statement 68.3 percent of the time. Respondents representing primarily defendants disagreed (34.1 percent) or strongly disagreed (27.7 percent) with the statement 61.8 percent of the time. Respondents representing both plaintiffs and defendants about equally agreed (32.7 percent) or strongly agreed (14.8 percent) with the statement 47.5 percent of the time and disagreed (21.5 percent) or strongly disagreed (10 percent) with the statement 31.5 percent of the time.



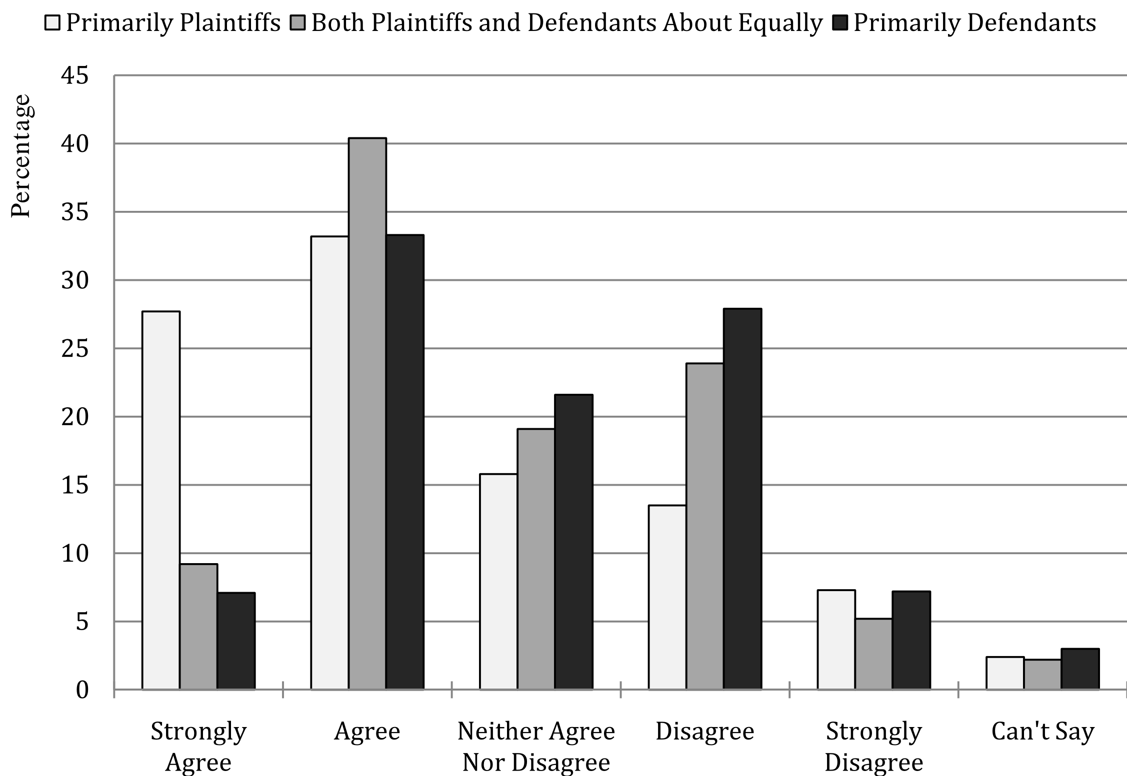
In short, while respondents who represent both plaintiffs and defendants about equally tend to agree that raising pleading standards would help to frame disputed issues earlier in litigation, they also tend to agree that the added burdens to plaintiffs would outweigh any benefits.

Respondents were then asked a series of questions about simplified procedures. The first such question, question 60, asked respondents whether the Rules' system of notice pleading and expansive discovery disproportionately increases the costs of litigating in federal court in relation to the system's benefits. For the rest of the simplified procedures questions, the report will continue to separate attorneys into three groups instead of two. The distribution of responses is displayed in Figure 27.



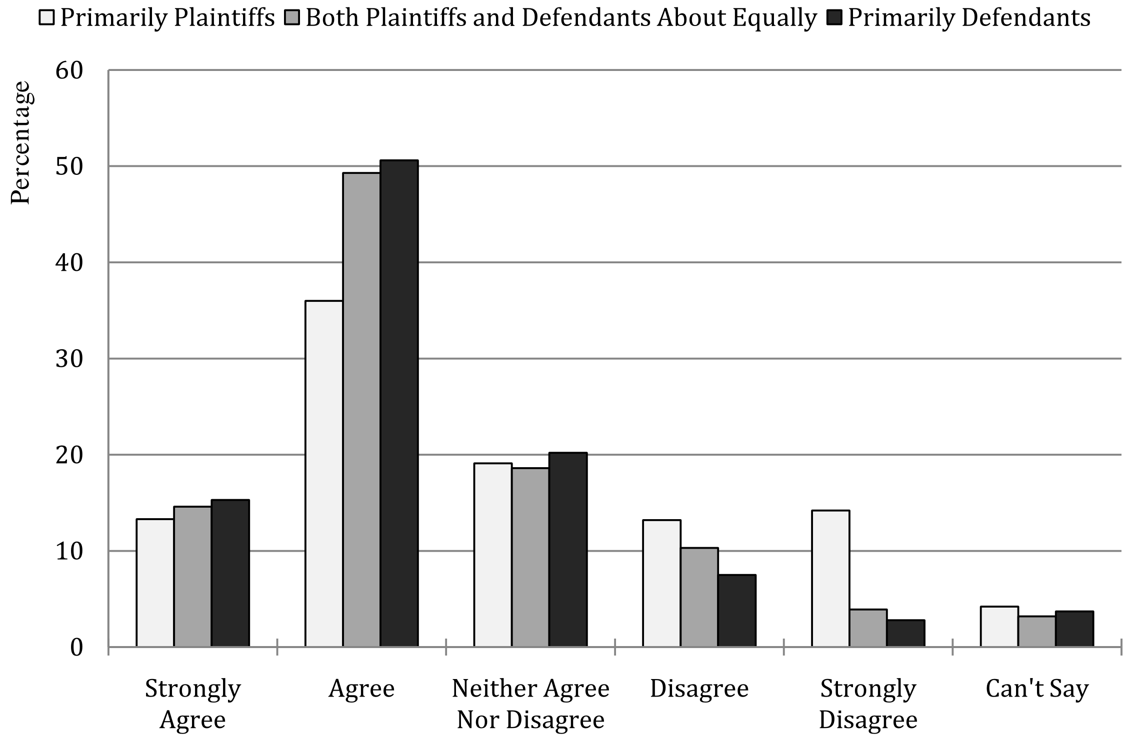
This question elicited mostly negative reactions from respondents representing primarily plaintiffs, relatively positive reactions from respondents representing primarily defendants, and decidedly mixed reactions from respondents representing both plaintiffs and defendants about equally. Respondents representing primarily plaintiffs disagreed or strongly disagreed with the statement 60.7 percent of the time, and agreed or strongly agreed just 19.5 percent. Respondents representing primarily defendants agreed or strongly agreed with the statement 46.9 percent of the time, and disagreed or strongly disagreed with the statement 32.6 percent of the time. Respondents representing both plaintiffs and defendants about equally agreed or strongly agreed with the statement 37.2 percent of the time and disagreed or strongly disagreed with the statement 40.7 percent of the time.

Respondents were next asked whether heightened pleading standards and restrictions on discovery would discourage litigants from filing cases in federal court. The distribution of responses is displayed in Figure 28.



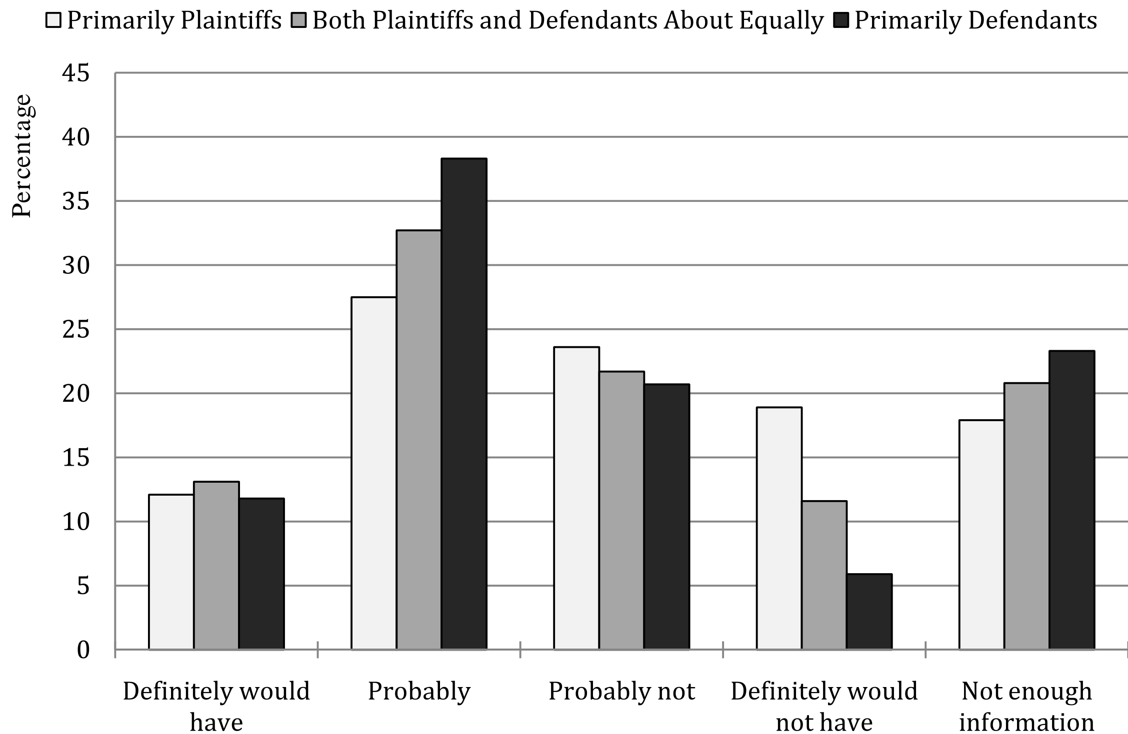
This question elicited agreement from plaintiff attorneys and, to a lesser extent, from the other two groups, as well. Respondents representing primarily plaintiffs agreed or strongly agreed with the statement 60.9 percent of the time and disagreed or strongly disagreed 20.8 percent of the time. Respondents representing primarily defendants agreed or strongly agreed with the statement 40.4 percent of the time and disagreed or strongly disagreed with the statement 35.1 percent of the time; this group of respondents included 21.6 percent who expressed no opinion. Respondents representing both plaintiffs and defendants about equally agreed or strongly agreed with the statement 49.6 percent of the time and disagreed or strongly disagreed with the statement 29.1 percent of the time.

The next questions asked about potential "pilot" programs in the federal courts. Question 62 asked whether the federal courts should test simplified procedures, with all parties' consent, in a few select districts to determine whether such an idea is feasible. The distribution of responses is displayed in Figure 29.



This question tended to elicit agreement, although more than a quarter of respondents representing primarily plaintiffs expressed disagreement. Respondents representing primarily plaintiffs agreed or strongly agreed with the statement 49.3 percent of the time; respondents representing both plaintiffs and defendants about equally agreed or strongly agreed 63.9 percent of the time; and respondents representing primarily defendants agreed or strongly agreed 65.9 percent of the time. About 1 in 5 respondents expressed no opinion.

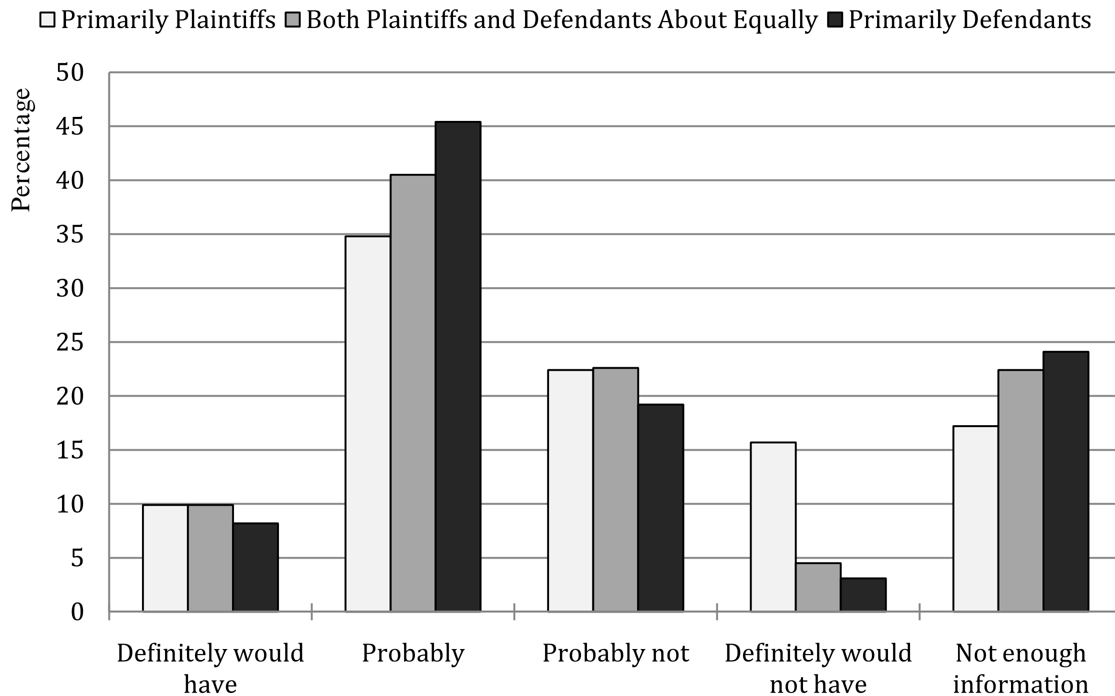
Respondents were next asked, if such simplified procedures had been an available option as part of such a test program at the time the closed case was filed, would they have recommended that their clients choose them over the existing Rules. The distribution of responses is displayed in Figure 30.



As the figure illustrates, the most common response for all three groups of respondents was "probably, depending on circumstances." Fully 27.5 percent of those representing primarily plaintiffs, 32.7 percent of those representing both plaintiffs and defendants about equally, and 38.3 percent of those representing primarily defendants responded "probably." An additional 11.8 to 13.1 percent of each group responded "definitely." Respondents representing primarily plaintiffs expressed the most skepticism about the idea, responding "probably not" 23.6 percent of the time and "definitely would not have" 18.9 percent of the time. It should be noted that from 17.9 to 23.3 percent of each group responded that they did not have enough information to answer the question.

The final question in Section V asked whether respondents would recommend simplified procedures, if available, generally to their clients. The distribution of responses is displayed in Figure 31.

Figure 31: Responses to "If such simplified procedures were an available option as part of such a test program at the time the named case was filed, would you generally recommend to clients that they choose them over the existing Rules?"

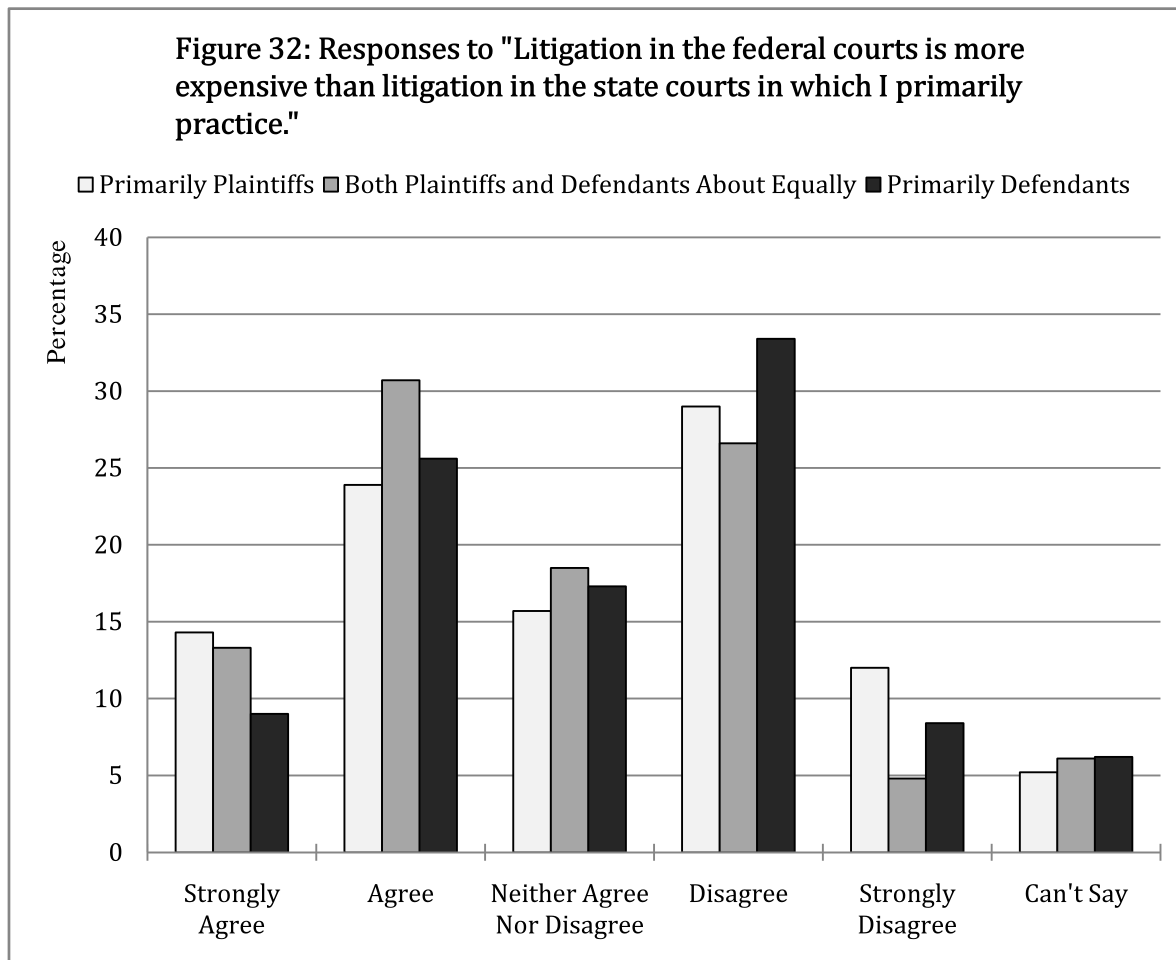


Again, the most common response was “probably, depending on circumstances,” which garnered 34.8, 40.5, and 45.4 percent, respectively, of the responses of the three groups. In short, respondents seemed somewhat more willing to consider participating in a test program in general than in the closed cases included in the sample. The percentage of respondents answering “definitely would,” however, declined slightly, compared with the percentage for the closed case. Once again, those representing primarily plaintiffs were more likely to respond “definitely would not,” and from 17.2 to 24.1 percent of respondents indicated that they did not have enough information to answer the question.

VII. The Federal Rules

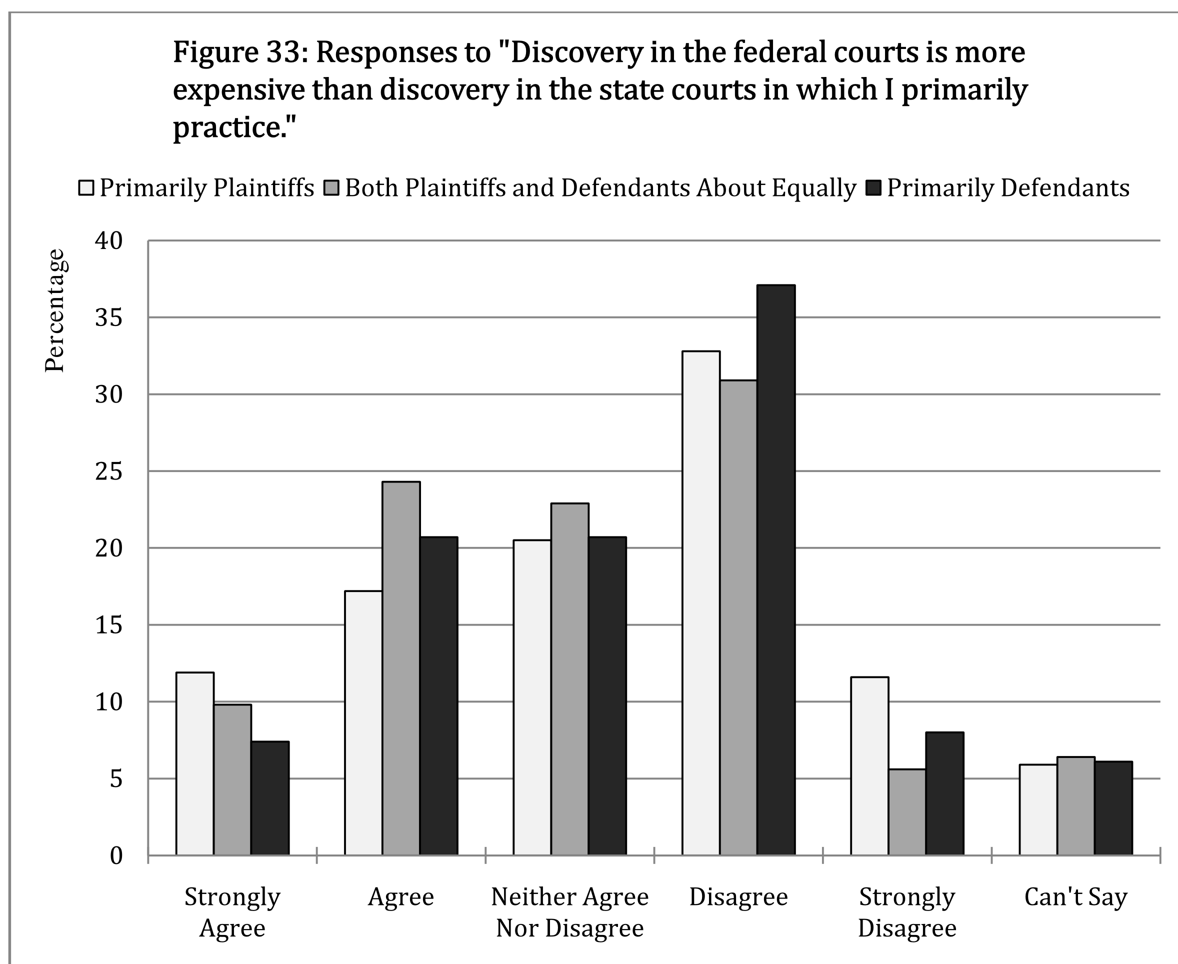
The last section of the survey asked respondents a series of questions about the Rules based on their experiences in general. In this section, reported responses are not weighted; there is no reason to expect that the disposition or duration of a single case is related to attorney attitudes about the Federal Rules, in general. For this section, respondents are broken into three groups: those who represent primarily plaintiffs; those who indicated that they represent plaintiffs and defendants about equally; and those who primarily represent defendants. The analysis includes all respondents, including those not reporting any discovery in the closed case.

Respondents were first asked (in question 65) whether litigation in the federal courts is more expensive than litigation in the state courts in which they primarily practice. The distribution of responses is displayed in Figure 32.



No group of attorneys agreed or disagreed with the statement a majority of the time. Those who primarily represent plaintiffs and those who primarily represent defendants disagreed or strongly disagreed 41.0 and 41.8 percent of the time, respectively, and agreed or strongly agreed 38.2 and 34.6 percent of the time, respectively. In short, these two groups were fairly evenly divided between agreeing and disagreeing, with the latter option taking a slight edge. In contrast, those who represent plaintiffs and defendants about equally were more likely to agree or strongly agree (44.0 percent of the time) than to disagree or strongly disagree (31.4 percent of the time).

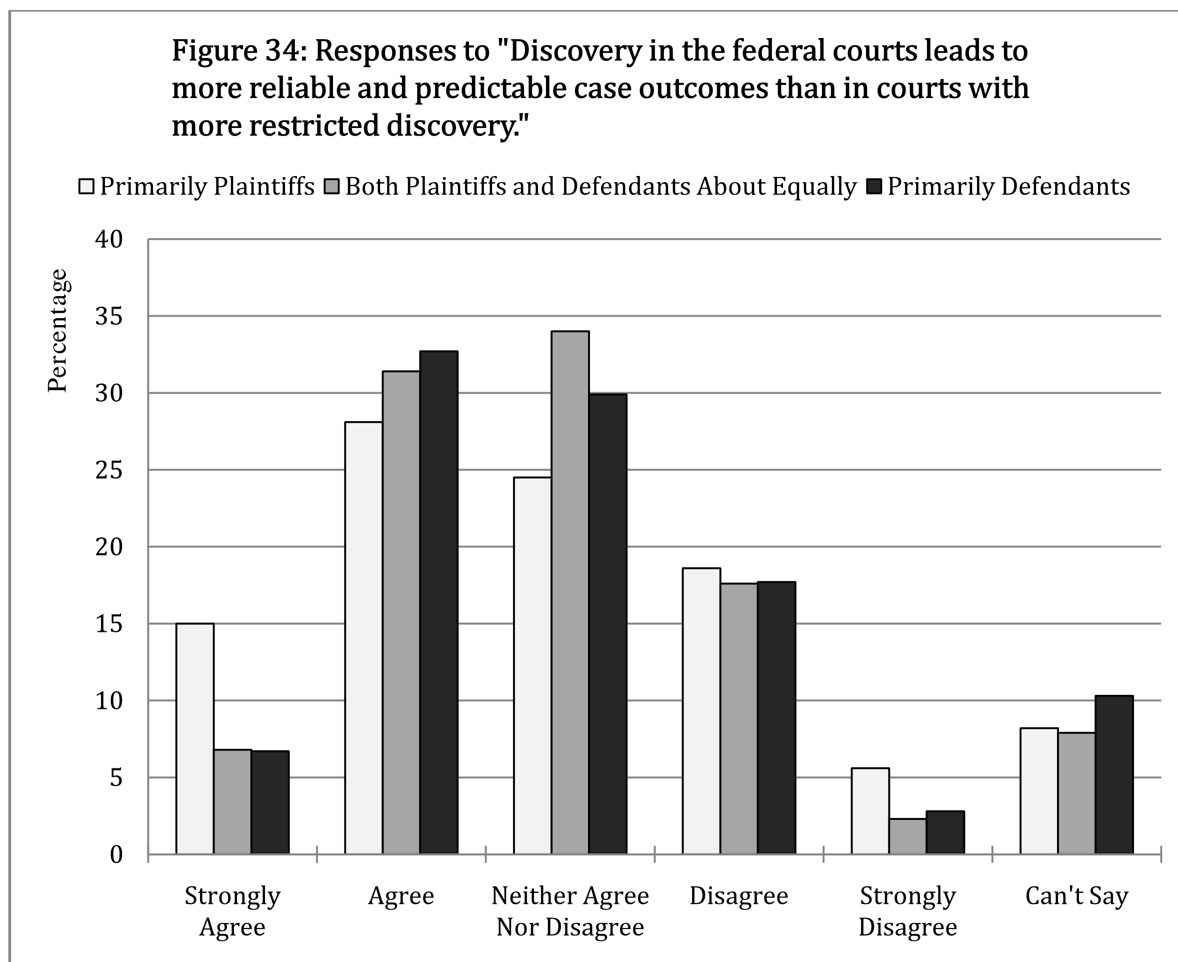
Question 66 asked respondents to compare discovery costs in the federal courts with discovery in the state courts in which they primarily practice. The distribution of responses is displayed in Figure 33.



This question tended to elicit mixed reactions from respondents, with neither agreement nor disagreement representing a majority view for any group of respondents. For all three groups of respondents, the modal response was disagreement. In terms of agreement, 29.1 percent of respondents representing primarily plaintiffs agreed or strongly agreed with the statement, 34.1 percent of respondents representing plaintiffs and

defendants about equally agreed or strongly agreed, and 28.1 percent of respondents primarily representing defendants agreed or strongly agreed. In terms of disagreement, 44.4 percent of respondents primarily representing plaintiffs disagreed or strongly disagreed, 36.5 percent of respondents representing plaintiffs and defendants about equally disagreed or strongly disagreed, and 45.1 percent of respondents primarily representing defendants disagreed or strongly disagreed. From 20 to 25 percent of respondents in each group neither agreed nor disagreed with the statement.

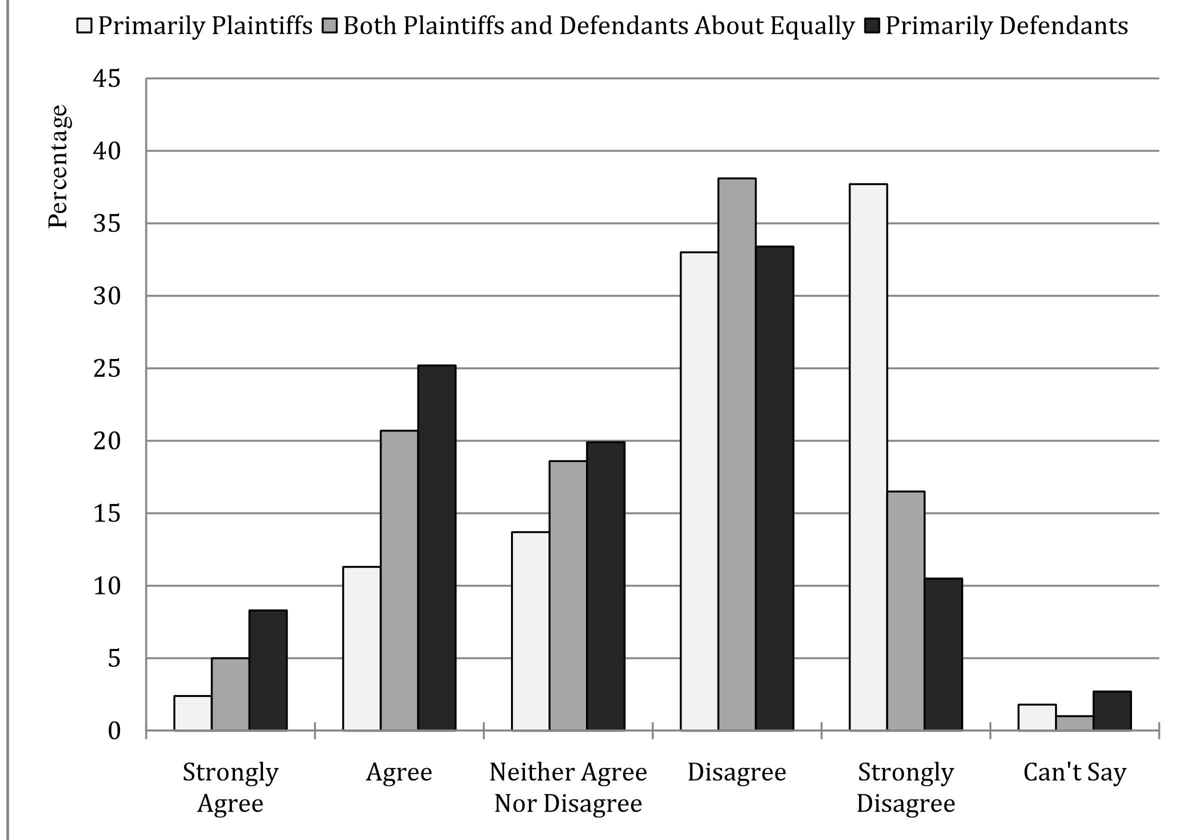
Question 67 asked respondents whether discovery in the federal courts leads to more reliable and predictable case outcomes than in courts with more restricted discovery. The distribution of responses is displayed in Figure 34.



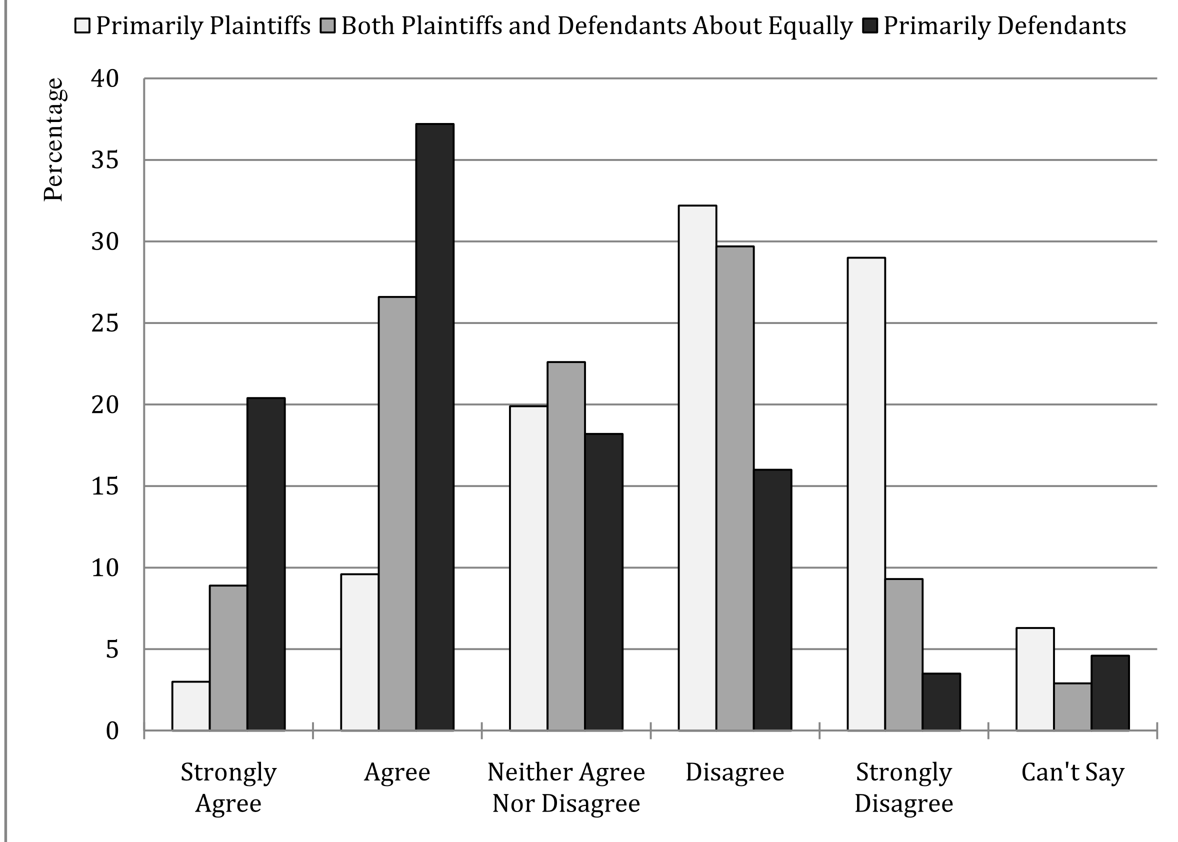
This question drew a large number of neutral responses. Almost 1 in 4 (24.5 percent) of those representing primarily plaintiffs neither agreed nor disagreed; 34 percent of those representing plaintiffs and defendants about equally neither agreed nor disagreed; and 29.9 percent of those primarily representing defendants neither agreed nor disagreed. In addition, about 10 percent of each group declined to answer. This level of neutrality to the statement may reflect a lack of experience in "courts with more restricted discovery" than in federal courts.

In terms of respondents taking a position on the question, agreement with the statement was around 20 percentage points higher in each group than disagreement. Respondents who primarily represent plaintiffs agreed or strongly agreed with the statement 43.1 percent of the time, and disagreed or strongly disagreed 24.2 percent of the time. Respondents who represent plaintiffs and defendants about equally agreed or strongly agreed with the statement 38.2 percent of the time, and disagreed or strongly disagreed 19.9 percent of the time. And respondents who primarily represent defendants agreed or strongly agreed with the statement 39.4 percent of the time, and disagreed or strongly disagreed 20.5 percent of the time. This level of agreement may simply reflect respondents' logical inference that less restricted discovery would give rise "to more reliable and predictable case outcomes," of course. It is still interesting that more than 1 respondent in 5 disagreed with the statement; the inference is that about 20 percent of respondents believe that more restricted discovery is not inconsistent with case outcomes at least as reliable and predictable as those in federal court.

Question 68 asked respondents whether the Rules should be revised to limit discovery in general. The distribution of responses is displayed in Figure 35. Unlike the previous question, this question did not draw a large number of neutral reactions. Respondents who primarily represent plaintiffs disagreed or strongly disagreed 70.7 percent of the time (37.7 percent strongly disagreed); this group agreed with the statement just 13.7 percent of the time. Somewhat surprisingly, respondents who primarily represent defendants disagreed or strongly disagreed with the statement 43.9 percent of the time, and agreed or strongly agreed 33.5 percent of the time. In other words, even those who primarily represent defendants were more likely to disagree than agree that discovery "in general" should be limited. A majority of respondents representing plaintiffs and defendants about equally disagreed or strongly disagreed with the statement (54.6 percent); this group agreed or strongly agreed with the statement about a quarter of the time (25.7 percent).

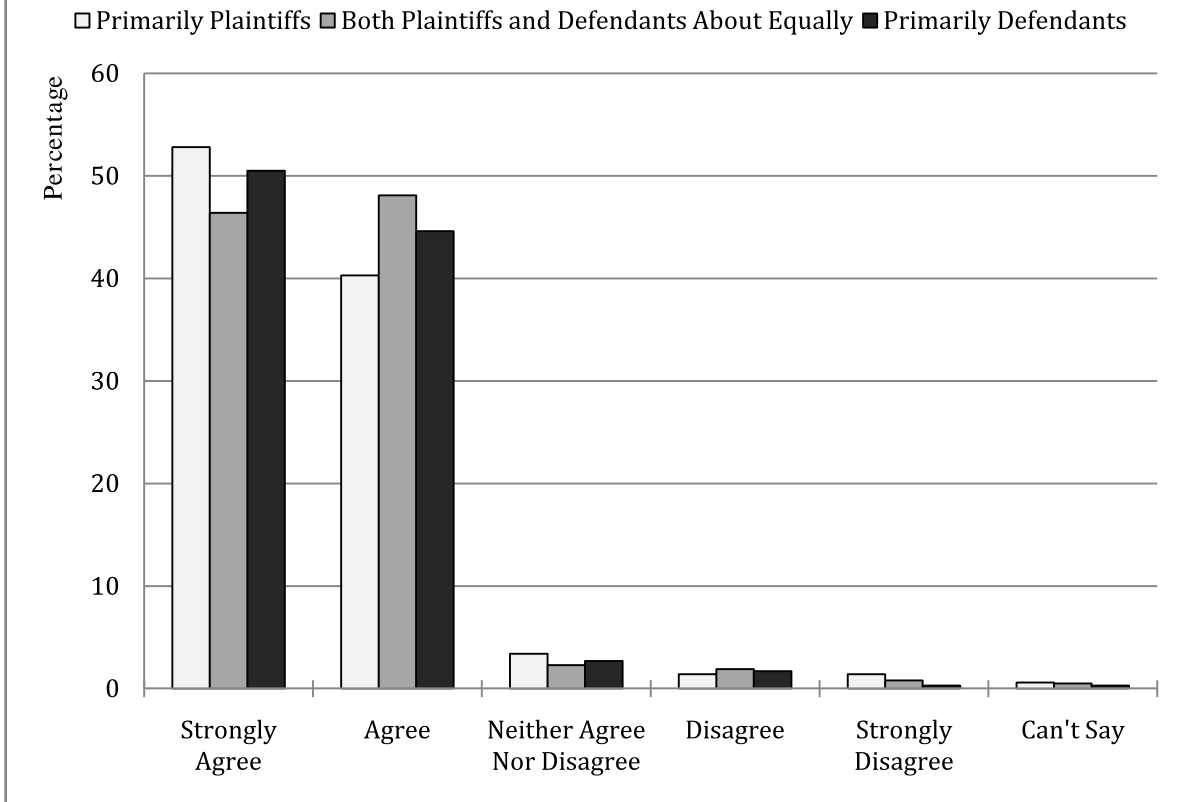


Question 69 asked respondents whether the Rules should be revised to limit electronic discovery. The distribution of responses is displayed in Figure 36. The responses to this question were highly polarized. A majority of those primarily representing defendants agreed or strongly agreed that the Rules should be revised to limit electronic discovery—57.6 percent. A majority of those primarily representing plaintiffs disagreed—61.2 percent. Only 12.6 percent of those primarily representing plaintiffs agreed or strongly agreed, and 34.8 percent of those primarily representing defendants disagreed or strongly disagreed. Those representing plaintiffs and defendants about equally were about evenly split on this question—35.5 percent of this group agreed or strongly agreed that the Rules should be revised to limit electronic discovery, 39 percent disagreed or strongly disagreed, and 22.6 percent neither agreed nor disagreed.

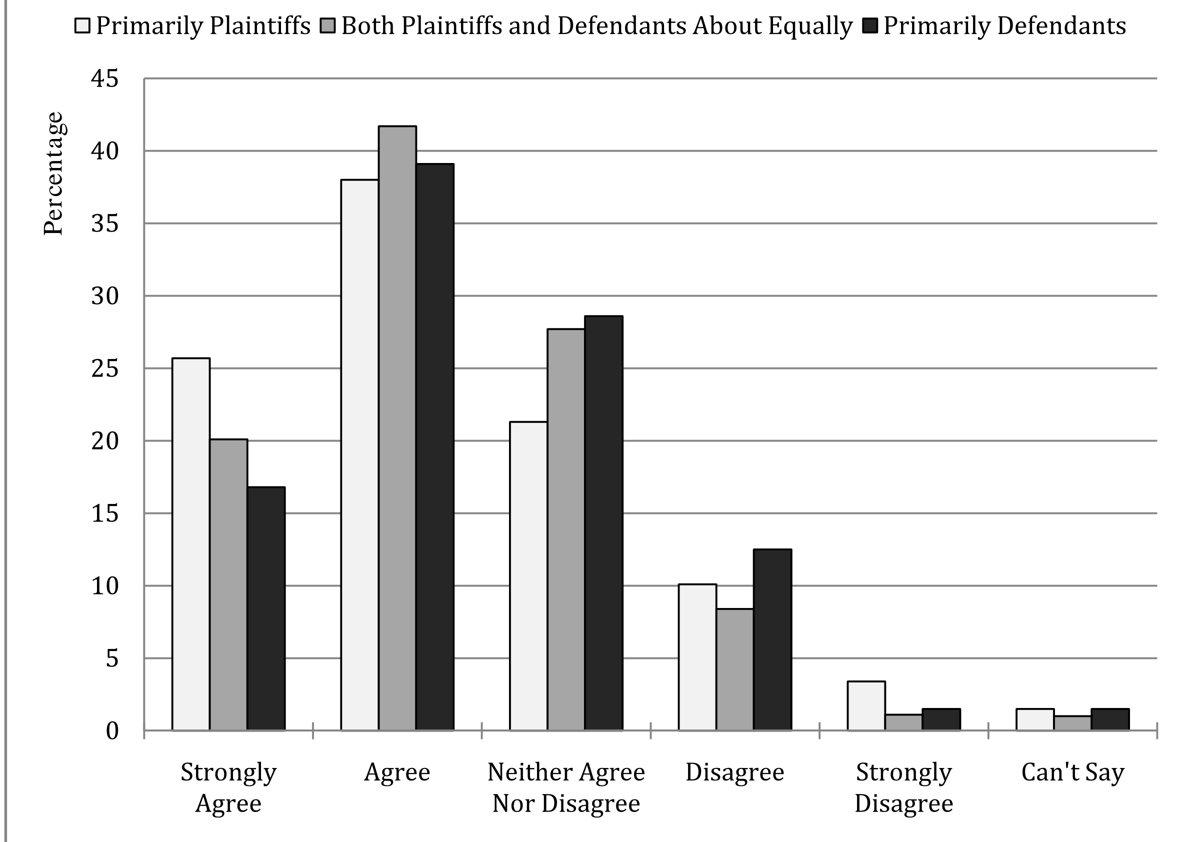


It is interesting that those representing primarily plaintiffs oppose limiting discovery in general 70.7 percent of the time but oppose limiting electronic discovery 61.2 percent of the time; the difference is almost certainly the larger number of respondents in that group taking a neutral or non-position with respect to electronic discovery. This probably reflects a lack of experience with electronic discovery issues—and thus less of a willingness to express a position on the issue—among this group of respondents. Those representing primarily defendants, on the other hand, are much more likely to support limited electronic discovery (57.6 percent) than to support limiting discovery in general (33.5 percent).

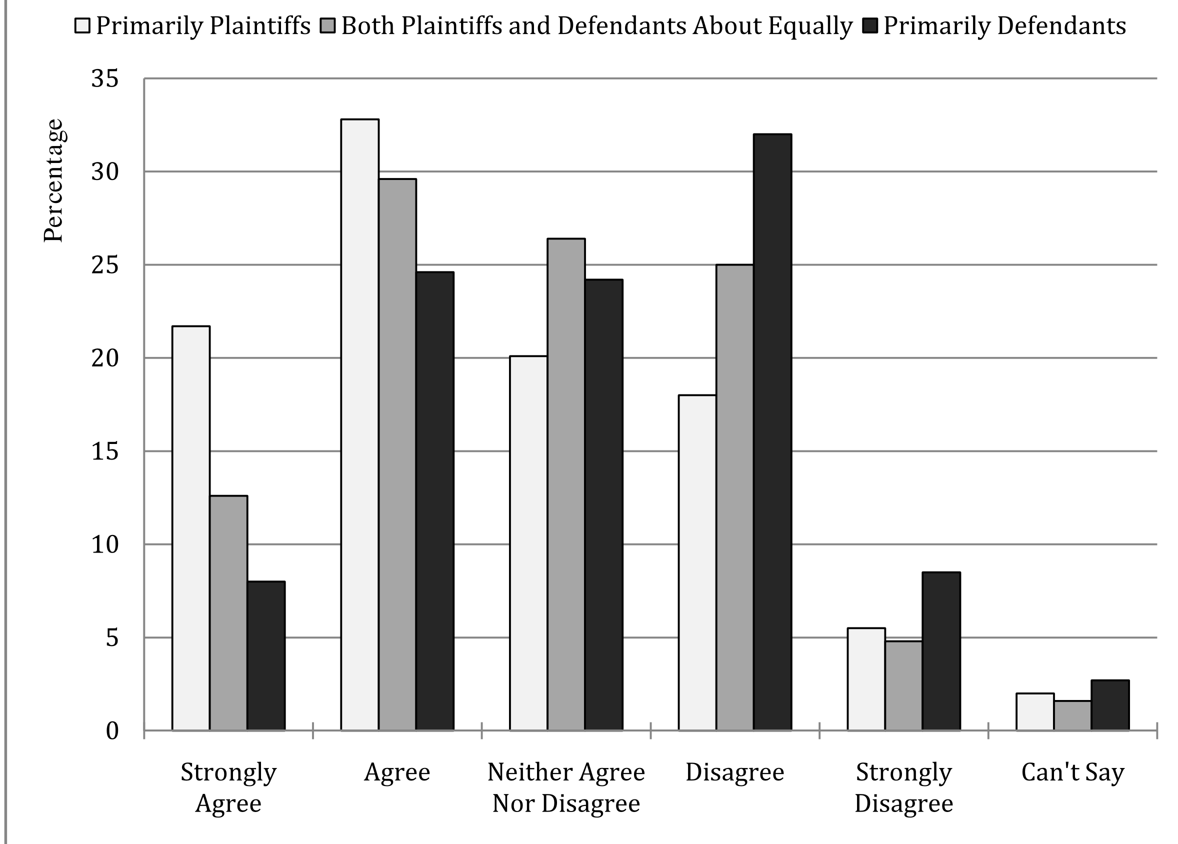
Question 70 asked respondents whether attorneys can cooperate in discovery while still being zealous advocates for their clients. The distribution of responses is displayed in Figure 37. There was little disagreement with this statement, and no substantive difference among the groups of respondents. Fully 93.1 percent of those representing primarily plaintiffs, 94.5 percent of those representing plaintiffs and defendants about equally, and 95.1 percent of those representing primarily defendants agreed or strongly agreed.



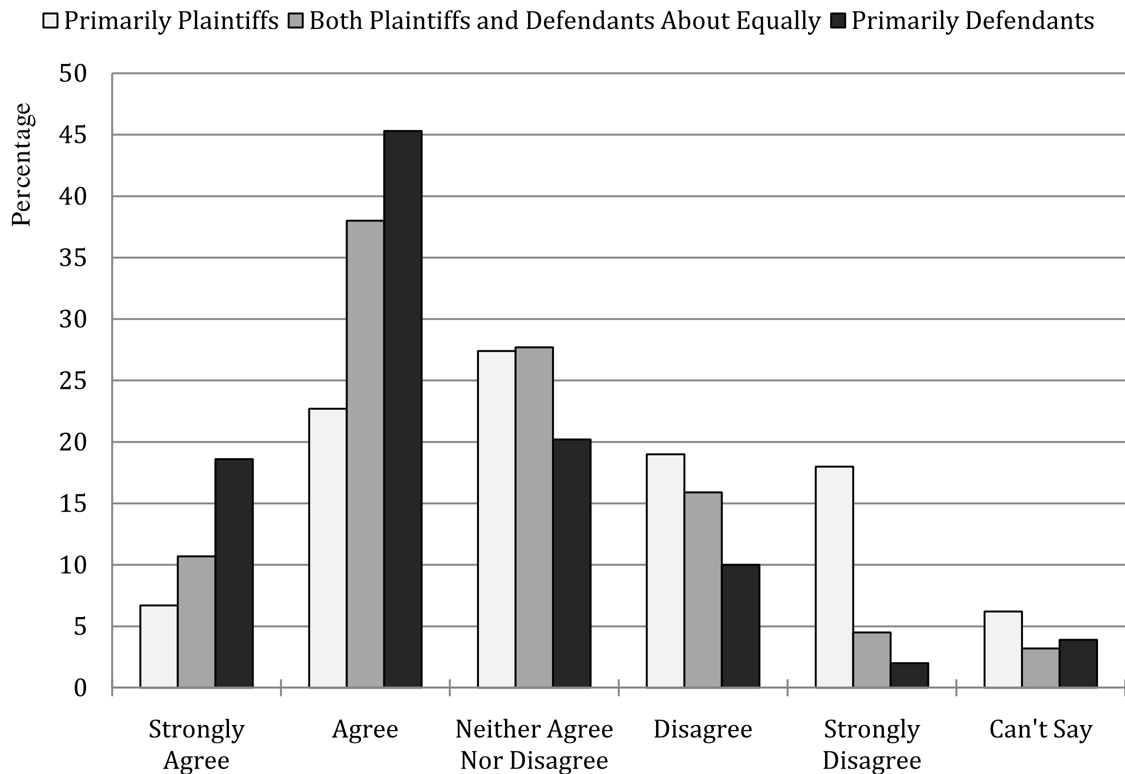
Question 71 asked respondents whether the Rules should be revised to enforce discovery obligations more effectively. The distribution of responses is displayed in Figure 38. This statement elicited agreement among all three groups. Those representing primarily plaintiffs agreed or strongly agreed 63.7 percent of the time, those representing plaintiffs and defendants about equally agreed or strongly agreed 61.8 percent of the time, and those primarily representing defendants agreed or strongly agreed 55.9 percent of the time. Disagreement with this statement was relatively uncommon—14 percent of those representing primarily defendants disagreed or strongly disagreed, and 13.5 percent of those representing primarily plaintiffs disagreed or strongly disagreed. Only 9 percent of those representing plaintiffs and defendants about equally disagreed or strongly disagreed.



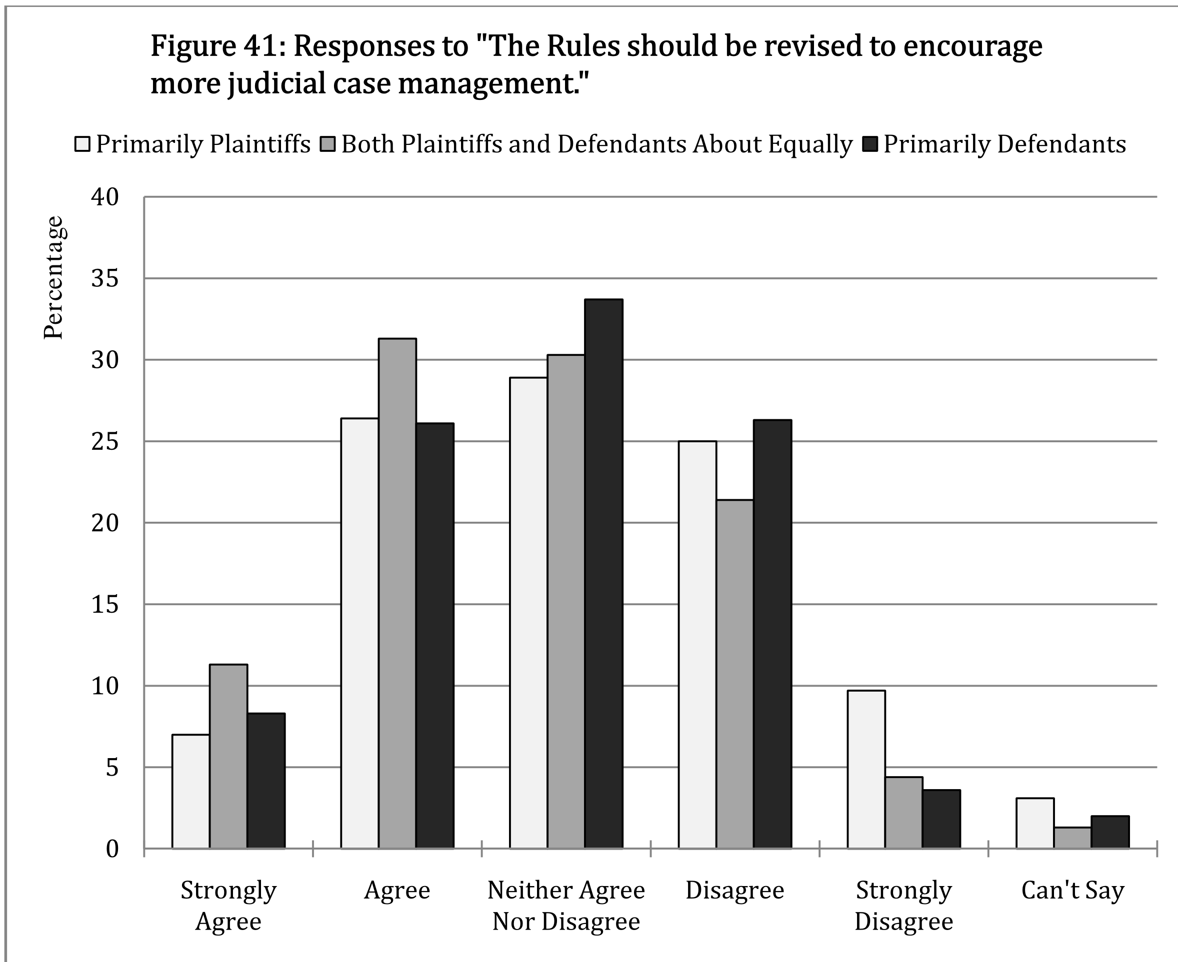
Question 72 asked respondents whether the Rules should be revised to require additional mandatory disclosures. The distribution of responses is displayed in Figure 39. This statement elicited majority support from attorneys primarily representing plaintiffs; respondents primarily representing defendants were more likely to disagree than to agree, but respondents representing plaintiffs and defendants about equally were more likely to agree than to disagree. Respondents primarily representing plaintiffs agreed or strongly agreed with this statement 54.5 percent of the time; that group disagreed or strongly disagreed only 23.5 percent of the time, and neither agreed nor disagreed 20.1 percent of the time. Respondents representing plaintiffs and defendants about equally agreed or strongly agreed 42.2 percent of the time, disagreed or strongly disagreed 29.8 percent of the time, and neither agreed nor disagreed 26.4 percent of the time. Respondents primarily representing defendants agreed or strongly agreed 32.6 percent of the time, disagreed or strongly disagreed 40.5 percent of the time, and neither agreed or disagreed 24.2 percent of the time.



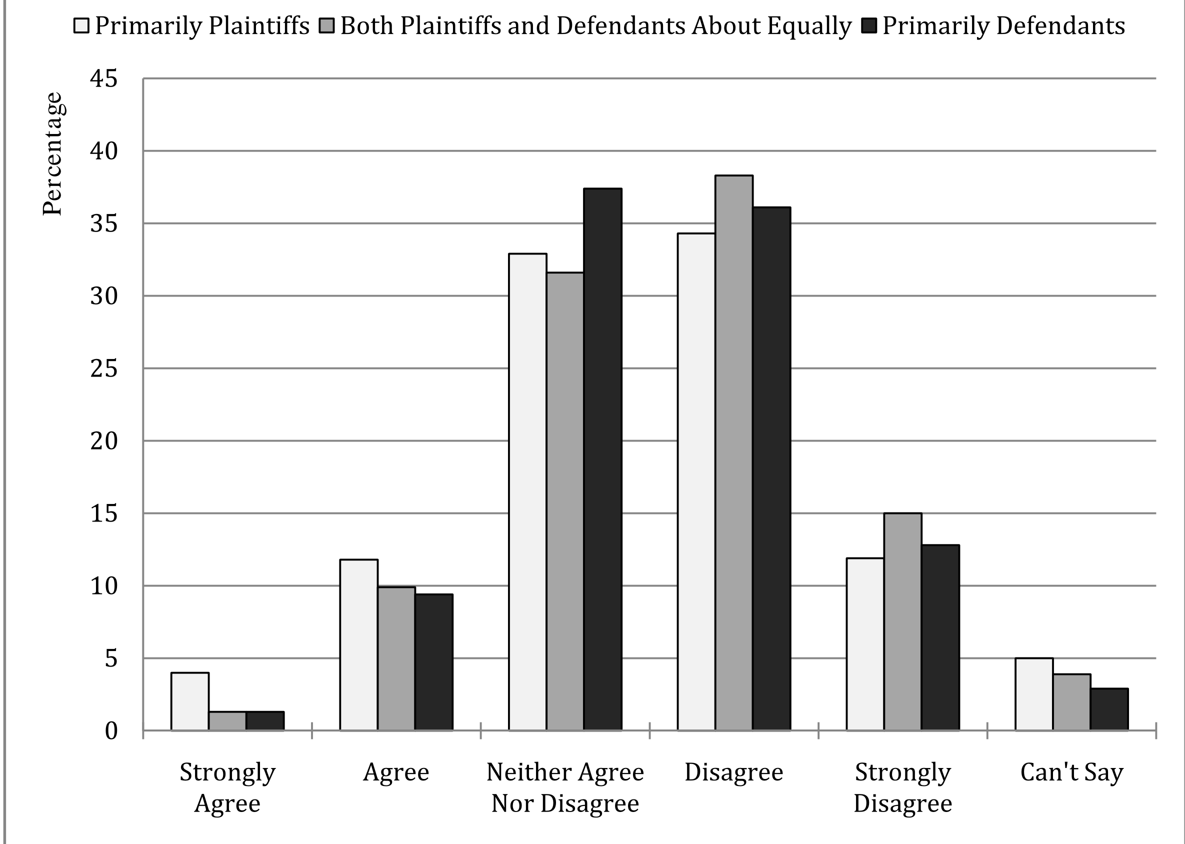
Question 73 asked respondents whether the Rules should be revised to provide for routine sharing of the costs of producing ESI when the burdens of production are not equal. The distribution of responses is displayed in Figure 40. The responses varied considerably by group. Respondents primarily representing defendants agreed or strongly agreed with this statement 63.9 percent of the time, disagreed or strongly disagreed 12 percent of the time, and neither agreed nor disagreed 20.2 percent of the time. Those representing primarily plaintiffs agreed or strongly agreed 29.4 percent of the time and disagreed or strongly disagreed 37 percent of the time; slightly more than a quarter of this group neither agreed nor disagreed with the statement (27.4 percent). Respondents representing plaintiffs and defendants about equally agreed or strongly agreed 48.7 percent of the time, disagreed or strongly disagreed 20.4 percent, and neither agreed nor disagreed 27.7 percent of the time.



Question 74 asked respondents whether the Rules should be revised to encourage more judicial case management. The distribution of responses is displayed in Figure 41. This statement did not elicit majority support from any of the groups. Respondents primarily representing plaintiffs agreed or strongly agreed 33.4 percent of the time, respondents representing both plaintiffs and defendants agreed or strongly agreed 42.6 percent of the time, and respondents representing primarily defendants agreed or strongly agreed 34.4 percent of the time. A substantial percentage of each group expressed no opinion in response to this statement: 28.9 percent of those representing primarily plaintiffs, 30.3 percent of those representing plaintiffs and defendants about equally, and 33.7 percent of those representing primarily defendants. Only those representing primarily plaintiffs were more likely to disagree or disagree strongly (34.7 percent) than to agree or agree strongly, and then only marginally so. Those representing plaintiffs and defendants about equally (25.8 percent) and those representing primarily defendants (29.9 percent) were less likely to disagree than to agree.

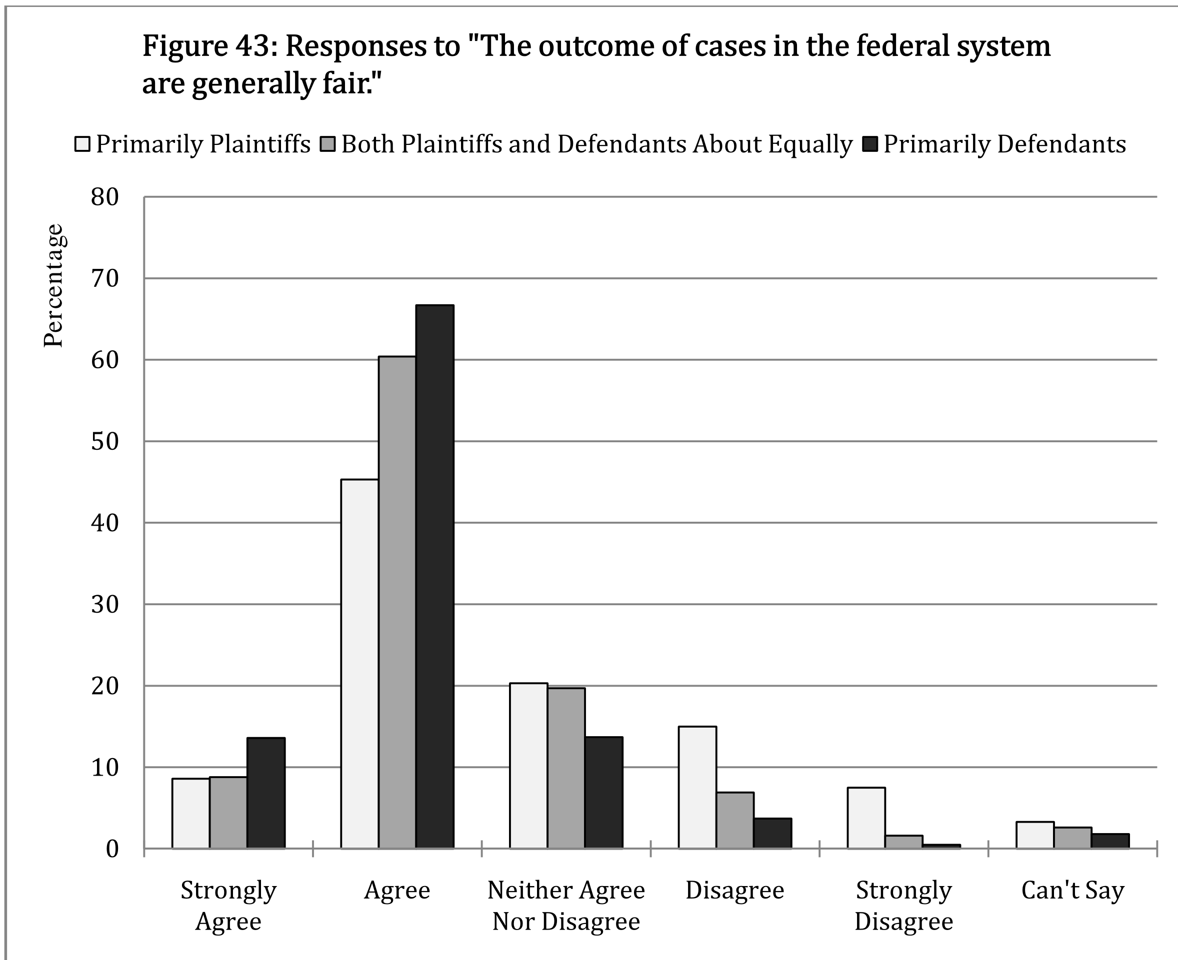


Question 75 asked respondents whether the Rules should be revised to discourage judicial case management. This statement tended to elicit neutral or negative reactions. The distribution of responses is displayed in Figure 42. Those representing primarily plaintiffs disagreed or disagreed strongly 46.2 percent of the time, those representing plaintiffs and defendants about equally disagreed or disagreed strongly 53.3 percent of the time, and those primarily representing defendants disagreed or strongly disagreed 48.9 percent of the time. Substantial percentages of each group neither agreed nor disagreed: 32.9 percent of those primarily representing plaintiffs, 31.6 percent of those representing plaintiffs and defendants about equally, and 37.4 percent of those representing primarily defendants. As one could infer from the preceding figures, few respondents agreed with this statement. Respondents primarily representing plaintiffs agreed or strongly agreed 15.8 percent of the time, those representing plaintiffs and defendants about equally agreed or strongly agreed 11.2 percent of the time, and those representing primarily defendants agreed or strongly disagreed 10.7 percent of the time.

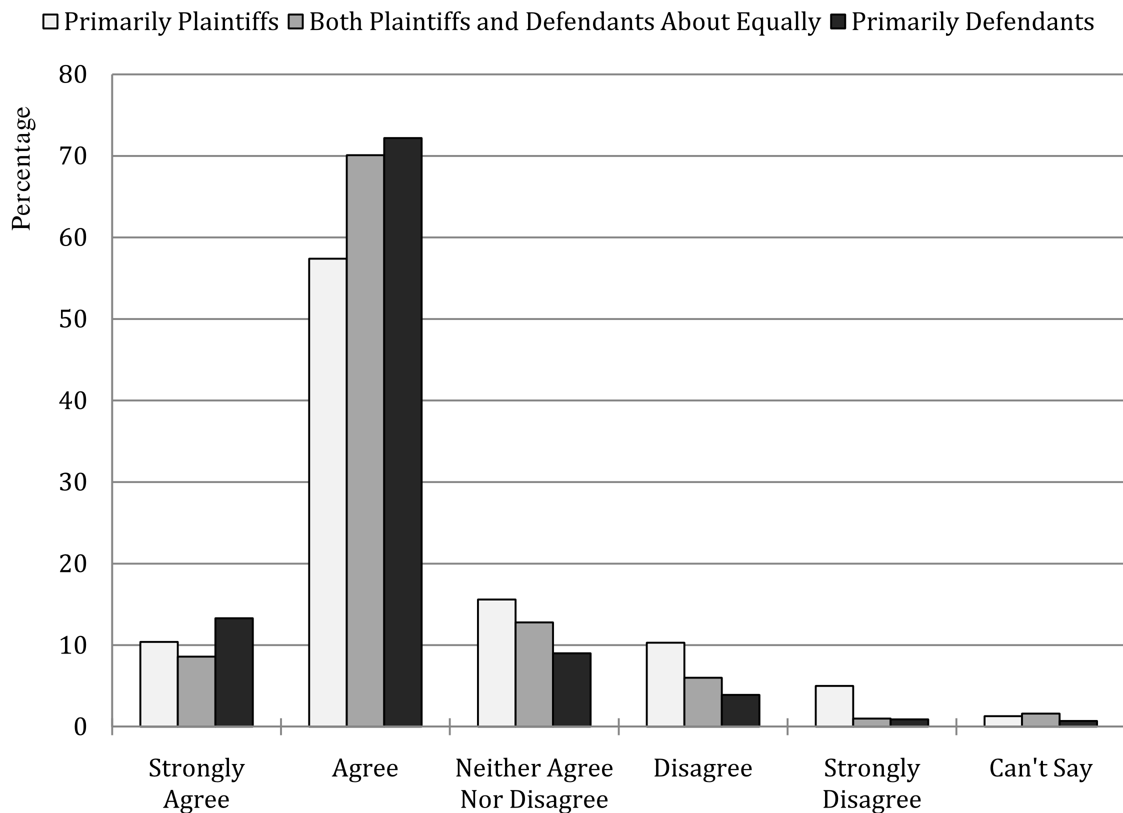


Taking questions 74 and 75 together, there appears to be some consensus that the Rules should not be revised to discourage case management by federal judges and that, moreover, the Rules should not be revised to encourage additional case management by those same judges.

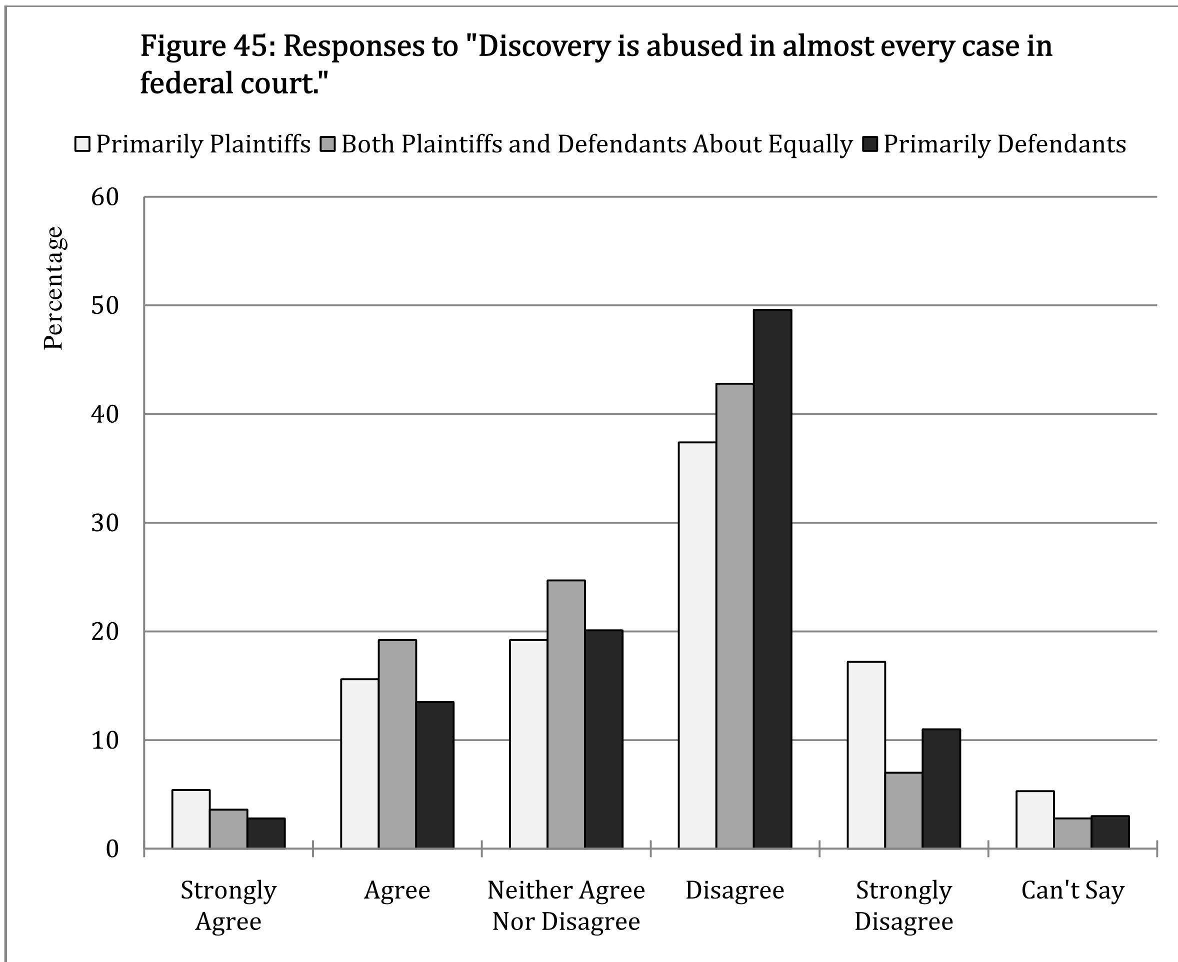
Question 76 asked whether the outcome of cases in the federal system are generally fair. The distribution of responses is displayed in Figure 43. A majority of every group of attorneys agreed or strongly agreed with the statement. However, those primarily representing plaintiffs were less likely than the other two groups to agree or strongly agree. Those primarily representing defendants agreed (two-thirds of all respondents in this category agreed) or strongly agreed 80.3 percent of the time; those primarily representing plaintiffs agreed or strongly agreed 53.9 percent of the time. Attorneys representing both about equally agreed or strongly agreed 69.2 percent of the time. Fully 22.5 percent of those primarily representing plaintiffs disagreed or disagreed strongly, compared with 8.5 percent of respondents representing both about equally and 4.2 percent of those representing primarily defendants. Moreover, 20.3 percent of those representing primarily plaintiffs, 19.7 percent of those representing both about equally, and 13.7 percent of those representing primarily defendants expressed no opinion.



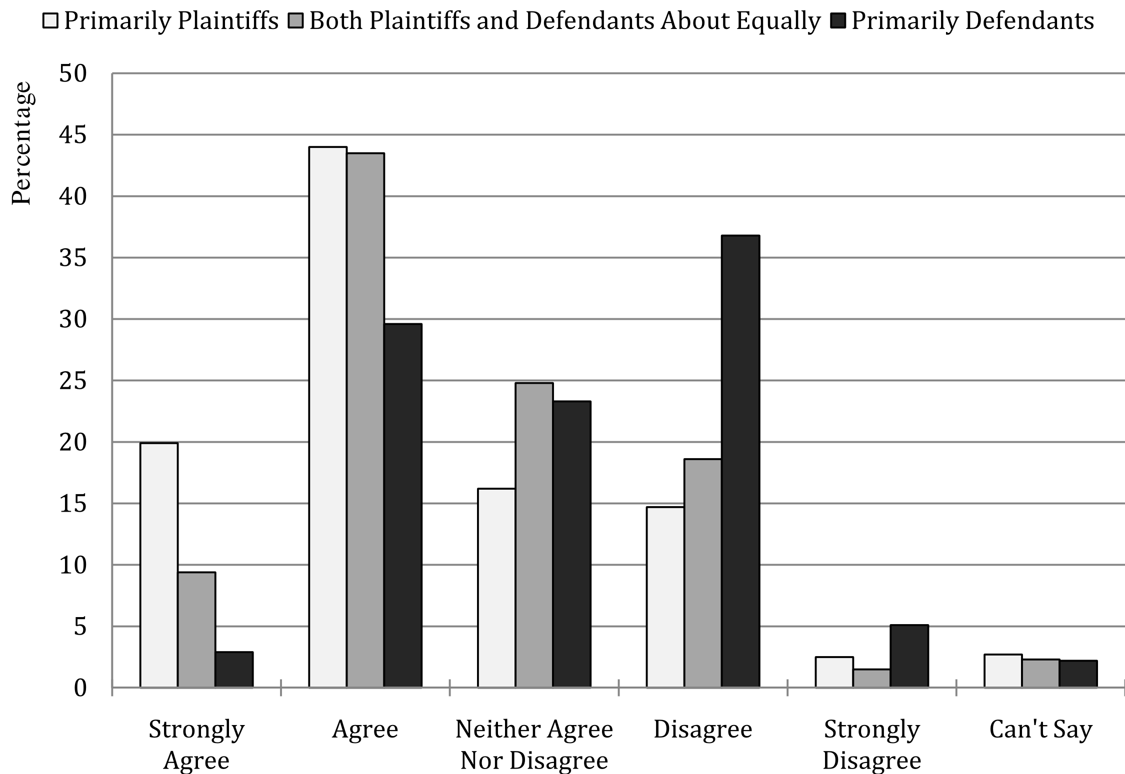
Question 77 asked whether the procedures employed in the federal courts are generally fair. The distribution of responses is displayed in Figure 44. All three groups agreed with this statement at least two-thirds of the time; however, those primarily representing defendants expressed the highest level of agreement with the statement. Those representing primarily plaintiffs agreed or strongly agreed 67.8 percent of the time, those representing both about equally agreed or strongly agreed 78.7 percent of the time, and those primarily representing defendants agreed or strongly agreed 85.5 percent of the time. Those primarily representing plaintiffs expressed no opinion 15.6 percent of the time, compared with 12.8 percent of those representing both about equally and 9 percent of those representing primarily defendants.



Question 79 asked whether discovery is abused in almost every case in federal court. The distribution of responses is displayed in Figure 45. This statement tended to draw negative responses. Those representing primarily plaintiffs disagreed or strongly disagreed 54.6 percent of the time, those representing both about equally disagreed or strongly disagreed 49.8 percent of the time, and those representing primarily defendants disagreed or strongly disagreed 60.6 percent of the time. By contrast, these groups agreed or strongly agreed 21, 22.8, and 16.3 percent of the time, respectively, and expressed no opinion 19.2, 24.7, and 20.1 percent of the time, respectively. Those representing primarily defendants had the most negative (and least positive) reaction to the statement.



Question 79 asked whether responding parties increase the cost and burden of discovery in federal court through delay and avoidance tactics. The distribution of responses is displayed in Figure 46. This question elicited an interesting set of responses. Those representing primarily plaintiffs tended to agree or strongly agree—63.9 percent of the time—as did those representing both plaintiffs and defendants about equally—52.9 percent of the time. Few respondents in these two groups—17.2 and 20.1 percent, respectively, disagreed or disagreed strongly. By contrast, those primarily representing defendants tended to disagree or strongly disagree (41.9 percent of the time), but this group also agreed or strongly agreed 32.5 percent of the time. Almost a quarter of both respondents primarily representing defendants (23.3 percent) and respondents representing both about equally (24.8 percent) expressed no opinion, as did 16.2 percent of those primarily representing plaintiffs.



Question 80 asked whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that they would not have settled but for that cost. The distribution of responses is displayed in Figure 47. Those representing primarily defendants and those representing both about equally tended to agree, agreeing or strongly agreeing 58.2 and 57.8 percent of the time, respectively. Respondents in these groups disagreed or strongly disagreed 25.3 and 21.4 percent of the time, respectively. However, those representing primarily plaintiffs agreed or strongly agreed 38.6 percent of the time and disagreed or strongly disagreed 37.6 percent of the time.

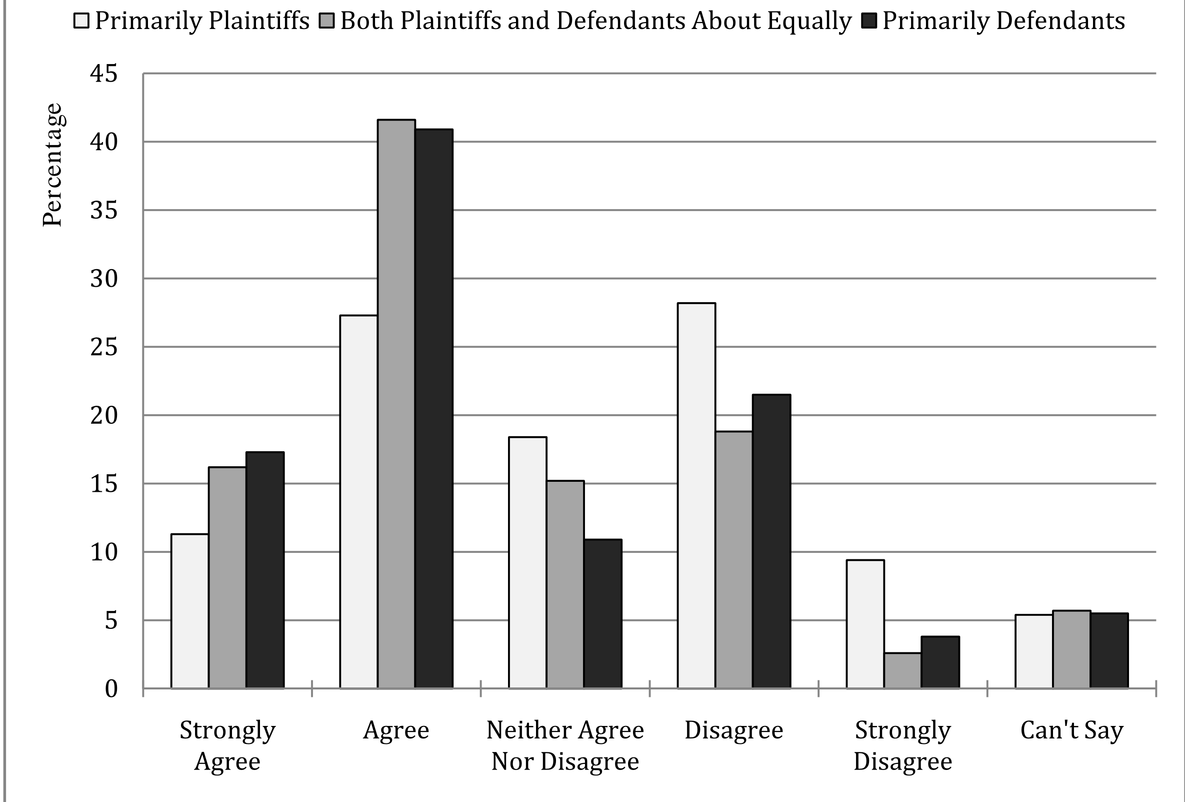
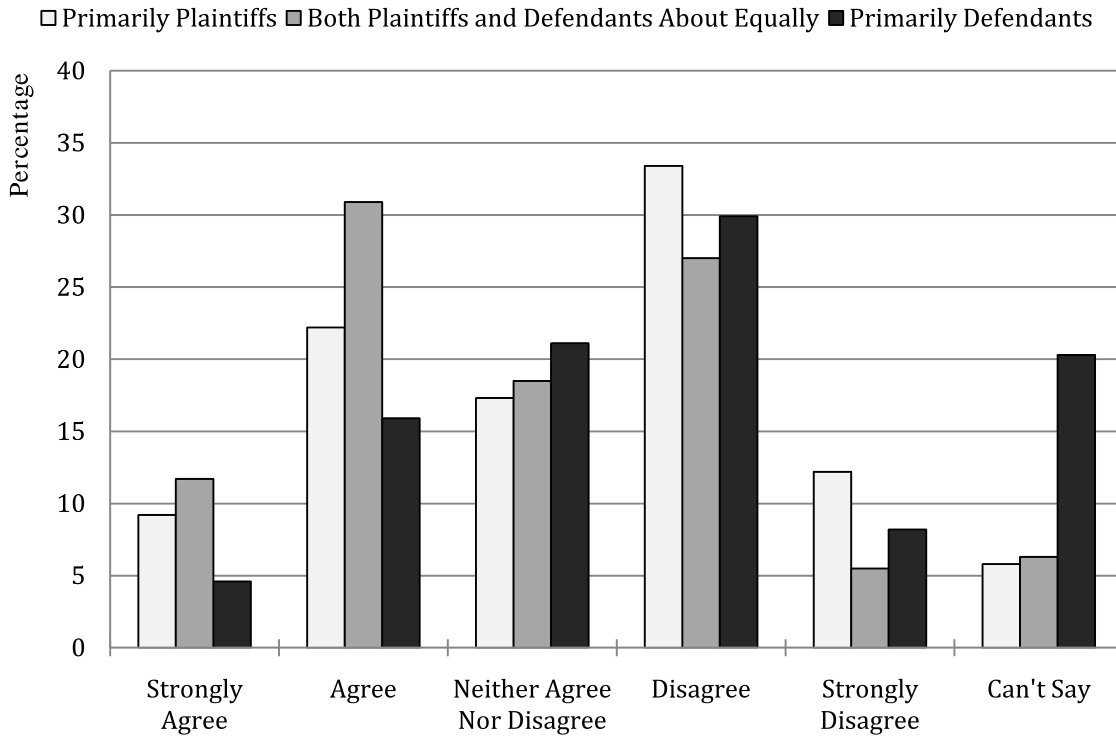


Figure 47: Responses to "The cost of litigating in federal court, including the cost of discovery, has caused at least one of my clients to settle a case that they would not have settled but for that cost."

Question 81 asked whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to abandon a claim that they would not have abandoned but for that cost. The distribution of responses is displayed in Figure 48. In none of the three groups did this statement yield a majority of positive responses. Those representing primarily plaintiffs were more likely to disagree with this statement than to agree, which is somewhat contrary to expectations. Fully 45.6 percent of this group disagreed or strongly disagreed with the statement, compared with 31.4 percent of the group who agreed or strongly agreed, and 17.3 percent who expressed no opinion. Those representing primarily defendants were also more likely to disagree than to agree. Of that group, 38.1 percent disagreed or strongly disagreed, compared with 21.5 percent who agreed or strongly agreed and 21.1 percent who expressed no opinion. A relatively large group of those representing primarily defendants (more than 1 in 5) declined to answer. The only group that was more likely to agree than to disagree was those representing both plaintiffs and defendants about equally. This group agreed or strongly agreed 42.6 percent of the time and disagreed or strongly disagreed 32.5 percent; they expressed no opinion 18.5 percent of the time.



Question 82, finally, asked respondents whether it would be better if more cases went to trial. The distribution of responses is displayed in Figure 49. This question elicited almost no differences among the groups of respondents, with the exception of the intensity of agreement among those primarily representing plaintiffs (who strongly agreed 17 percent of the time). The three groups agreed or strongly agreed 32.5, 30.5, and 32.2 percent of the time, respectively; expressed no opinion 27.1, 27.8, and 27.9 percent of the time, respectively; and disagreed or strongly disagreed 38.2, 39.4, and 37 percent of the time, respectively. In short, about 3 in 10 attorneys agree that it would be better if more cases went to trial; almost 3 in 10 have no opinion; and almost 4 in 10 disagree.

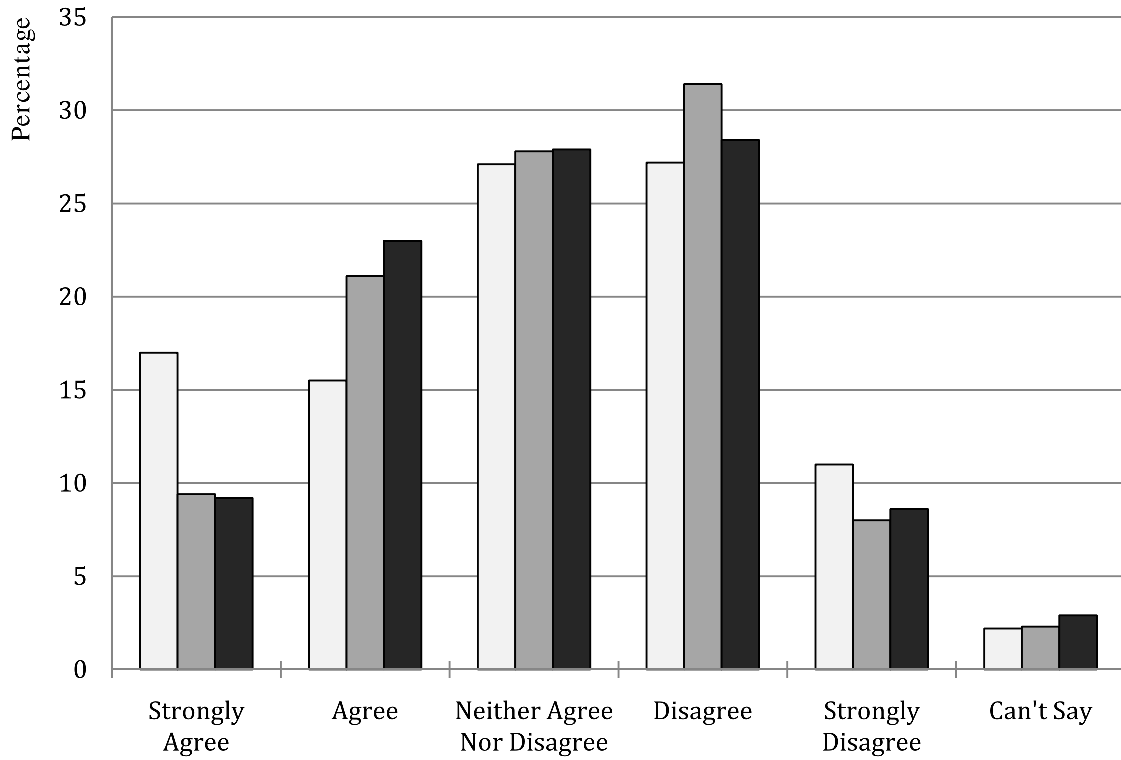


Figure 49: Responses to "It would be better if more cases went to trial."
Primarily Plaintiffs
Both Plaintiffs and Defendants About Equally
Primarily Defendants
Percentage
35
30
25
20
15
10
5
0
Strongly Agree
Agree
Neither Agree Nor Disagree
Disagree
Strongly Disagree
Can't Say

There should be a choice "not applicable" rather than "unable to say."There was no question regarding sanctions ordered by the magistrate or trial judge and, if so, whether the sanctions related to findings of fact or were monetary in nature and or both. There should have been some type of classifications of cases, i.e., personal injury, product liability, police misconduct, labor and employment, intellectual law, etc.

We [are] a national group, which w/o judges and variations depending on the local court, manages discovery based on the different case types, applying rules consistent throughout the entire Federal Court system.

Well thought out survey

You have too much time on your hands.

Excellent survey.

Good luck with the review process. We look forward to seeing the results.

Good luck.

I found this survey very interesting and look forward to the results. I could not personally answer the technical questions about e-discovery but hopefully others could.

I would be interested in obtaining the poll results when they are complete. Thank you for asking me to participate. Very interesting.

[Named case] was a foreclosure case, which is not how a typical case is handled.